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PROVIDING A FOUNDATION FOR WEALTH CREATION AND DEVELOPMENT IN AFRICA: THE ROLE OF THE RULE OF LAW

*John Mukum Mbaku**

INTRODUCTION

Africa of the mid-to-late twentieth century was a continent afflicted with many ills—extremely inefficiently managed economies; high levels of political and bureaucratic corruption; capriciousness and arbitrariness in the delivery of public goods and services; rampant military intervention in politics; violent and destructive ethnic mobilization, some of which resulted in brutal civil wars; ecosystem degradation; and generally very poor economic performance.¹ Such an environment could hardly

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1. For a review of these issues see generally WORLD BANK, ACCELERATED DEVELOPMENT IN SUB-SAHARAN AFRICA: AN AGENDA FOR ACTION (World Bank, 1981) [hereinafter ACCELERATED DEVELOPMENT IN SUB-SAHARAN AFRICA]; ORGANIZATION OF AFRICAN UNITY [OAU], THE LAGOS PLAN OF ACTION FOR THE ECONOMIC DEVELOPMENT OF AFRICA 1980–2000, at 4, 6, 42, 77 (1981), *available at* http://www.nepadst.org/doclibrary/pdfs/lagos_plan.pdf; PREPARING AFRICA FOR THE TWENTY-FIRST CENTURY: STRATEGIES FOR PEACEFUL COEXISTENCE AND SUSTAINABLE DEVELOPMENT (John Mukum Mbaku ed., 1999); JOHN MUKUM MBAKU, INSTITUTIONS AND REFORM IN AFRICA: THE PUBLIC CHOICE PERSPECTIVE (1997) [hereinafter MBAKU, INSTITUTIONS AND REFORM IN AFRICA]; JOHN MUKUM MBAKU, INSTITUTIONS AND DEVELOPMENT IN AFRICA (2004) [hereinafter MBAKU, INSTITUTIONS AND DEVELOPMENT]; CORRUPTION AND THE CRISIS OF INSTITUTIONAL REFORMS IN AFRICA (John Mukum Mbaku ed., 1998) [hereinafter CORRUPTION AND THE CRISIS OF INSTITUTIONAL REFORMS]; JOHN MUKUM MBAKU, CORRUPTION IN AFRICA: CAUSES, CONSEQUENCES, AND CLEANUPS (2010) [hereinafter MBAKU, CORRUPTION IN AFRICA].

have been considered attractive to domestic investors, let alone those from outside the continent. The political and economic uncertainties brought about by these events led not only to Africa's failure to attract foreign investment, but also to capital flight as domestic savers sought investment opportunities in more stable economies abroad.²

In the mid-1980s, however, grassroots pro-democracy movements emerged in many African countries. Riding on the wave of the global struggle for change that had begun in the Iberian Peninsula in the mid-1970s, the pro-democracy movements successfully toppled various civilian and military dictatorships, paving the way for significant improvements in governance.³ Later, buoyed by the collapse of the brutal and inhumane apartheid system in South Africa,⁴ Africa's pro-democracy movements successfully established an enabling environment

2. See IMF, EXTERNAL DEBT AND CAPITAL FLIGHT IN SUB-SAHARAN AFRICA (S. Ibi Ajayi & Mohsin S. Khan eds., 2000) (examining the continent's twin evils of capital flight and increasing external debts and offering reasons for such a state of affairs); Léonce Ndikumana & James K. Boyce, *Africa's Revolving Door: External Borrowing and Capital Flight in Sub-Saharan Africa*, in THE POLITICAL ECONOMY OF AFRICA 132-51 (Vishhnu Padayachee ed., 2010) (showing that political instability in Africa is a major cause of capital flight). Note that capital, as used here, includes both financial and human capital. During the last several decades, many highly skilled and educated Africans have exited their economies and migrated to Europe, North America, the Middle East, and various parts of East Asia, notably Australia and New Zealand, in search of opportunities to make more effective use of their skills and, at the same time, avoid being subjected to the vagaries of authoritarian rule in their home countries.

3. See generally THE TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA: THE CONTINUING STRUGGLE (John Mukum Mbaku & Julius O. Ihonvbere eds., 2003) [hereinafter TRANSITION TO DEMOCRATIC GOVERNANCE] (providing a detailed analysis of Africa's transition to democratic governance, which began in the mid-1980s); POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES (Julius O. Ihonvbere & John Mukum Mbaku eds., 2003) (examining Africa's transition to democratic governance with specific emphasis on the experiences of a number of countries).

4. See, e.g., PATTI WALDMEIR, ANATOMY OF A MIRACLE: THE END OF APARTHEID AND THE BIRTH OF THE NEW SOUTH AFRICA (1997) (providing an eyewitness account of events leading to the demise of one of the most brutal and inhumane governmental regimes ever devised by man); RICHARD TAMES, THE END OF APARTHEID: A NEW SOUTH AFRICA (examining critical milestones in the evolution and demise of the apartheid system in South Africa).

for the continent's transition to democratic governance.⁵ Thus, Africa's political economy in the twenty-first century has been significantly different from that which characterized the continent in the previous century. While many problems remain, investors—both domestic and foreign—are beginning to see the continent as an emerging market for both trade and investment. After many decades of extremely poor governance and dismal economic performance, thanks to reforms developed and implemented during the last four decades or so, Africa is poised to become a global center for significant economic activities. According to the World Bank, as many as thirty-six governments in sub-Saharan Africa have significantly improved their economies' regulatory environments, leading to increased trade and investment.⁶

Additionally, the reforms that have taken place in the continent since the mid-1980s have paved the way for the growth of a robust civil society, which is gradually taking an active part in governance—in fact, in countries such as Ghana and South Africa, civil society has become an important check on the government.⁷ And, in Egypt and Tunisia, civil society and its organizations were responsible for toppling long-serving autocratic rulers and paving the way for these countries to accelerate their transition to democratic governance and the rule of law.⁸

5. For a thorough review of some of the changes that opened up political spaces for participation by popular forces, and hence enhanced the continent's transition to more effective governance systems, see *MULTIPARTY DEMOCRACY AND POLITICAL CHANGE: CONSTRAINTS TO DEMOCRATIZATION IN AFRICA* (John Mukum Mbaku & Julius O. Ihonvbere eds., 2006).

6. WORLD BANK, *DOING BUSINESS 2012: DOING BUSINESS IN A MORE TRANSPARENT WORLD* 1–2 (2011).

7. See EMMANUEL GYIMAH-BOADI, MIKE OQUAYE & F.K. DRAH, *CIVIL SOCIETY ORGANIZATIONS AND GHANAIAN DEMOCRATIZATION* (2000) (examining the role of civil society in Ghana's democratization); *THE STATE OF THE PEOPLE: CITIZENS, CIVIL SOCIETY AND GOVERNANCE IN SOUTH AFRICA, 1994–2000* (Bert Klandermans, Marlene Roefs & Johan Olivier eds., 2001) (detailing the role played by citizens and their organizations in the transformation of South Africa from the apartheid-induced dictatorship to participatory and inclusive democratic governance).

8. ASHRAF KHALIL, *LIBERATION SQUARE: INSIDE THE EGYPTIAN REVOLUTION AND THE REBIRTH OF A NATION* (2011) (discussing, *inter alia*, the role of non-governmental organizations and civil society organizations in Egypt's recent "revolution"); IGNACIO GARCIA MARIN, *POLITICAL PARTICIPATION, DEMOCRACY AND INTERNET: TUNISIAN REVOLUTION* (2011) (drawing lessons from the use of

Along with the rise of civil society, which is helping improve governance in the continent, there have been discoveries of significant natural resources in various countries that are likely to provide the catalyst for growth. In addition to Ghana, Kenya and Uganda have discovered considerable deposits of petroleum and arrangements are already underway to exploit these resources and make the proceeds available for investment in various sectors of national economies.⁹ Finally, many developed countries have taken a renewed interest in investing in Africa. For example, since 1998, the People's Republic of China ("PRC") has significantly increased its volume of trade and investments in Africa.¹⁰ In addition, China's former president, Hu Jintao, made several official trips to the continent and many African heads-of-state have been brought to China to consult with the PRC's business and political leaders, including Salva Kiir Mayardit, president of South Sudan, Africa's latest independent country. Significant contact between Africa and the PRC during the last several decades has resulted in China emerging as Africa's biggest trade and investment partner.¹¹ According to Ching, "[t]he speed with which China has engaged with the continent is breathtaking, with two-way trade rising about 30 percent each year so far in the 21st century, reaching a record [US]\$166 billion in 2011."¹²

Recently, the United States has indicated an interest in improving its trade relations with Africa. Members in both houses of Congress introduced the "Increasing American Jobs Through Greater Exports to Africa Act of 2012," (HR 4221/SB 2215) a bill designed to increase U.S. economic engagement with the

the Internet by Tunisian civil society to overthrow their country's autocratic regime).

9. See, e.g., DUNCAN CLARKE, *CRUDE CONTINENT: THE STRUGGLE FOR AFRICA'S OIL PRIZE* (2008) (providing a historical review of Africa's oil resources and the scramble by multinational companies for them).

10. See, e.g., THE NEW PRESENCE OF CHINA IN AFRICA (Meine Pieter van Dijk ed., 2009) (detailing the evolution of Chinese economic activities in Africa).

11. Frank Ching, *China Deepening Aid and Trade Ties with Africa*, JAPAN TIMES (July 28, 2012), <http://www.japantimes.co.jp/opinion/2012/07/28/commentary/china-deepening-aid-and-trade-ties-with-africa/#.UXg-vWOTPiQ>.

12. *Id.*

continent of Africa.¹³ These developments—which increased Chinese trade with the continent and the recent interest of the U.S. Congress to improve the country’s trade relations with Africa—augur well for wealth creation and the eradication of poverty in the continent.

Despite what appears to be an august environment for trade and investment in Africa, it is important to recognize that the type of economic growth that results in development—that is, growth that produces significant improvements in human conditions, especially for the poorest 20% of the population—cannot take place in Africa under the existing institutional environment. Granted, since the mid-1980s, there have been significant social, economic, and political transformations in the continent. In fact, governance systems have improved in most of the continent. Yet, as recent events in Egypt, Tunisia, and Libya have shown, most African countries have yet to deepen and institutionalize democracy and hence, provide themselves with legal and judicial systems that guarantee the rule of law. For one thing, Africans, like their counterparts in other parts of the world, are not just interested in increases in the gross domestic product—they want to participate in the creation of that wealth and receive their equitable share of all the proceeds of economic growth. They want to live in peace with their neighbors; they want to get married and raise families; they want to live free of government tyranny; they want to use their talents and resources to create the wealth that they need to meet their obligations; they do not want their values infringed upon by either state or non-state actors; and they want to be able to govern themselves.¹⁴ What they want is human development,

13. S. 2215, 112th Cong. (2012); H.R. 4221, 112th Cong. (2012). It is important to note that this bill died in committee in 2012. In addition, the Senate version of the bill states that its goal is “increasing United States exports to Africa by at least 200 percent in real dollar value within 10 years.”

14. Charles Manga Fombad has studied constitutional reforms in Cameroon. Specifically, he has examined the reforms that produced the 1996 Cameroon Constitution (officially known as Law No. 96-06 of 18 January 1996 to Amend the Constitution of 2 June 1972) and concluded that their outcomes were not institutional arrangements that enhanced the rule of law or significantly improved governance. He added that “[t]he [1996] constitution has rendered in one sweep the future of Cameroon’s fledgling democracy bleak.” In addition, Fombad argues that “[a]nother glaring disappointment is the failure of this constitution [i.e., the 1996 Constitution], like its predecessors, to formally recognise and protect Cameroon’s bi-jural legal heritage.” Charles

not just increases in GDP. Unfortunately, most African countries, including those such as Egypt, Tunisia, and Libya that have recently gone through “revolutions,” have not yet transformed their political economies well enough to create institutional environments capable of promoting and sustaining significant improvements in human development. To promote genuine and sustained human development in Africa, each country must undertake necessary reforms to provide itself with institutional arrangements that guarantee the rule of law. Specifically, each country must engage its citizens in democratic constitution-making to produce institutional arrangements that adequately constrain civil servants and political elites, provide the wherewithal for the effective management of ethnic and religious diversity, and promote entrepreneurial activities and the creation of wealth, especially among historically marginalized and deprived groups. Such a set of institutional arrangements is characterized by a general adherence and fidelity to the rule of law.¹⁵

Manga Fombad, *Judicial Power in Cameroon's Amended Constitution of 18 January 1996*, 9 LESOTHO L.J. 1, 10 (1996) [hereinafter Fombad, *Judicial Power in Cameroon's Amended Constitution*]. Fombad also states that “[a]lthough the amended Constitution professes to institute, for the first time, what it terms ‘judicial power,’ this is largely ineffective because of the President’s unlimited powers to appoint and dismiss judges.” CHARLES MANGA FOMBAD, *CONSTITUTIONAL LAW IN CAMEROON* 31–32 (2012) [hereinafter FOMBAD, *CONSTITUTIONAL LAW*]. In 2008, Cameroon’s National Assembly amended the constitution again, but the outcome was not an improved set of rules. For one thing, the new constitution paved the way for the President of the Republic, Paul Biya, to become president-for-life—Article 6(2) abolishes the two-term limit imposed by the 1996 Constitution and allows the President to run for re-election indefinitely. Law No 2008/001 of 14 April 2008 to Amend and Supplement Some Provisions of Law No. 96-06 to Amend the Constitution of 2 June 1972 (“Constitution of Cameroon 2008”), art. 6(1). In addition, Article 53(3) of the same constitution grants the President of the Republic immunity from prosecution for any criminal acts committed by him while in office. Law No. 2008/001 of 14 April 2008 to Amend and Supplement Some Provisions of Law No. 96-06 of 18 January 1996 to Amend the Constitution of 2 June 1972 (“Constitution of Cameroon 2008”).

15. See, e.g., MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 1, at 267–302 (emphasizing the importance of institutions to development in Africa). Here, “human development” involves much more than increases in the national output. Certainly, the increased wealth associated with the higher GDP may, under the appropriate institutional environment, provide the additional resources needed to significantly improve national standards of living. Whether such economic growth would lead to improvements in the standard

This research seeks to accomplish the following objectives: (i) emphasize the need to complete Africa's transition, which began in the 1980s, and produce within each country governance structures that guarantee the rule of law; and (ii) show that while there have been significant institutional changes in the continent during the last several decades, genuine human development in Africa requires the institutionalization, in each country, of the rule of law.

The methodology that is employed in this study is James M. Buchanan's¹⁶ constitutional political economy model, which analyzes how societies formulate, select, and amend the rules that regulate their sociopolitical interactions. Rules, which Ad-

of living, especially for the bottom half of the population, would be determined by the nature of the country's institutional arrangements. For example, in a country in which the citizens enjoy a significant level of economic freedom—that is, where the right to engage freely in exchange and contracting is constitutionally guaranteed and entrenched—and most citizens are well-educated and possess the skills required by the productive sector, the rise in the GDP or economic growth would come primarily from the contributions of these citizens. Income distribution would reflect such contributions—that is, the bulk of the people would benefit from economic growth, leading to significant increases in development. However, if growth derives primarily from the export of raw materials such as oil, the production of which does not utilize significant amounts of local labor, then little or no income would accrue to domestic labor and it would be left to the government to effect the necessary redistributions of income. Unfortunately, for many countries in the region, high levels of corruption have usually made such redistributions ineffective as a way to stimulate development. Besides, redistribution of income is not a sustainable way to enhance development. Development involves more than providing citizens with access to more financial resources. Citizens want to have the opportunity to create wealth for themselves, and not depend on the government or some other external source to provide it to them. Citizens want self-respect and the right to participate in community and family life. In Africa, ethnic and religious groups want to be able to practice their religions, cultures, and traditions without interference from state or non-state actors. Where the rule of law exists, citizens have a much better chance of achieving genuine development. *See, e.g.,* John Mukum Mbaku, *Entrenching Economic Freedom in Africa*, 23 CATO J. 217 (2003); *THE QUALITY OF LIFE* (Martha Craven Nussbaum & Amartya Kumar Sen eds., 1993) (elaborating on the concept of development and providing a working definition for development that goes beyond increases in per capita income).

16. *See generally* JAMES M. BUCHANAN, *THE ECONOMICS AND THE ETHICS OF CONSTITUTIONAL ORDER* 3–18 (1994).

am Smith called “laws and institutions,”¹⁷ have a significant impact on, and to a great extent determine the outcomes that result from sociopolitical interaction. Brennan and Buchanan argue that while rules enhance the ability of individuals to maximize their values, which may include engaging in wealth-creating activities, they do so in a context in which they do not prevent others from doing the same.¹⁸ That is, in providing citizens with the tools to organize their private lives and maximize their values, rules also serve the “negative function of preventing disastrous harm.”¹⁹

Throughout the continent, although governance systems have improved significantly, many citizens still face rules that empower their governors to oppress, exploit, and infantilize them.²⁰ This is due partly to the fact that the process through which these rules were selected was top-down, elite-driven, and non-participatory. Such a non-democratic approach to constitution-making produced rules that were not locally-focused and did not reflect the values and interests of each country’s relevant stakeholders. Of course, because they were not selected by the people themselves, these rules were not relevant to the problems that the various groups in each African country faced on a daily basis, and hence, could not help them organize their private lives. Instead, the rules served primarily the interests—specifically for primitive accumulation—of the ruling classes.

Peaceful coexistence and wealth creation in Africa, in particular, and human development in general, require state re-

17. See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 106 (Edwin Cannan ed., University of Chicago Press 1976) (1887).

18. GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES: CONSTITUTIONAL POLITICAL ECONOMY 14 (1985).

19. *Id.*

20. For an example, see Cameroon’s 2008 Constitution, an amended version of the 1996 Constitution. The 2008 Constitution retained the enormous powers vested in the president of the Republic by the 1996 Constitution. In addition, it provided the opportunity for the extant president, Paul Biya, to become president-for-life, as well as granted the president immunity from prosecution for any criminal acts committed by him while in office. See Law No. 2008/001 of 14 April 2008 to Amend and Supplement some Provisions of Law No. 96-06 of 18 January 1996 to Amend the Constitution of 2 June 1972; CONST. OF THE REPUBLIC OF CAMEROON, arts. 6(1), 53(3); FOMBAD, CONSTITUTIONAL LAW, *supra* note 14, at 111.

construction and reconstitution through democratic constitution-making to produce institutional arrangements that guarantee the rule of law. This study dissects the elements of the rule of law and shows how critical they are to the management of ethnic diversity and therefore to the promotion of peaceful coexistence, the creation of wealth, the eradication of poverty, and the advancement of human development in Africa.

I. FRAMING THE PROBLEM

A. Colonialism and Its Institutions

After the annexation and colonization of an African territory by a European nation, the colonizer proceeded to impose institutional arrangements that it hoped would significantly enhance its ability to exploit Africa's large endowments of resources for the benefit of the metropolitan economies.²¹ Effective colonization required the colonial power to restructure the critical domains (economic, cultural, and bureaucratic) and impose new legal and judicial institutions on the colonies. This process was expected to enhance the ability of the European colonial elites to subjugate and rule each colony's population groups, and to provide the institutional structure within which metropolitan-based mercantile firms could help exploit the resources of the new territories and Christian missionaries could sell their version of salvation to "heathen natives."²²

21. See generally SIR ALAN CUTHBERT BURNS, *HISTORY OF NIGERIA* (Allen and Unwin 1963) (examining British colonization of Nigeria); HARRY R. RUDIN, *GERMANS IN THE CAMEROONS, 1884–1914: A CASE STUDY IN MODERN IMPERIALISM* (1968) (detailing the founding of the German colony of Kamerun and the subsequent exploitation of its resources by German entrepreneurs).

22. For example, when the French took over the administration of the eastern part of the former German colony of Kamerun, they faced significant opposition from various kingdoms that existed in what is now generally referred to as French Cameroons. One such kingdom was Bamoun, whose sovereign, Sultan Njoya, had developed a script for the kingdom's language and used it to produce tracts on laws and customs, as well as a volume that outlined a "new religion based on Islam, Christianity, and Bamoun traditional religious practice." JOHN MUKUM MBAKU, *CULTURE AND CUSTOMS OF CAMEROON* 73 (2005) [hereinafter MBAKU, *CULTURE AND CUSTOMS OF CAMEROON*]. Sultan Njoya subsequently established royal schools throughout the kingdom and instruction was offered using the new script. Additionally, a printing press was established to produce materials for education and social dialogue. However, after World War I, Bamoun became part of French Cameroons. As part of their colonial policy, the French introduced a new educa-

To minimize the costs of exploitation of resources, it was necessary for a European power to devise an effective mechanism to manage ethnic and religious diversity in its colonies. The colonizer could have taken advantage of existing traditional approaches to conflict resolution or helped the new colony develop democratic institutions, which would have provided the institutional mechanism for colonial population groups to live together peacefully. Instead, the colonizers used their comparative advantage in the employment of violence to force the Afri-

tional system and proceeded to destroy the kingdom's traditional forms of instruction: French Christian missions took over administration of schools; French became the only legal language of instruction in schools; and a curriculum based on French culture and civilization was introduced and subjects relevant to the local populations were disallowed. In addition to destroying the king's printing press and effectively halting the creation of knowledge relevant to local development, the French colonial authorities forcefully removed Sultan Njoya and sent him to Yaoundé (then, the capital of French Cameroons), where he died in isolation and away from his people. *Id.* See also John Mukum Mbaku, *Copyright and Democratization in Africa*, 7 *BYU INT'L L. & MGMT. REV.* 51, 53–54 (2011).

Shortly after annexation of territories in the Cameroon River District in 1884, the German colonial government sought to accord the territories a *locus standi* in the German legal system. However, there was no constitutional discourse within the colonies, nor were the colonial inhabitants granted an opportunity to either refuse association with Germany, or to determine the terms of the arrangement. Instead, Bismarck brought the matter to the German Reichstag when he introduced a bill on January 12, 1886. The bill was subsequently passed on April 10, 1886. In addition to the fact that citizens of the colony of Kamerun were never consulted during the process of writing this “colonial constitution,” subsequent amendments to the law were undertaken entirely in Germany—the bill was actually developed or drafted by a committee that was significantly influenced by a German planter in Kamerun, Adolf Woermann. The new “constitution” vested enormous powers in the Kaiser. This “concentration of authority in [the hands of the Kaiser] was the legal device through which [German] traders sought to be as unhampered in administering and exploiting the colonies as they had been in acquiring them.” RUDIN, *supra* note 21, at 127–129, 159. Hence, as was typical of other colonizers of Africa, the Germans established a colony on the Cameroon River District in 1884 called Kamerun and introduced laws and institutions that helped them maximize their objectives. According to Adolf Woermann, the leading German trader in Kamerun, these objectives were “increasing German trade, English opposition to German traders generally and especially in the court of equity, the need of protecting trade against natives, the fear of the French and their high discriminatory duties, and the fear of the Congo treaty made by Portugal and England.” *Id.* at 33. Note that the term “metropolitan” as used throughout this Article refers to the country that owns the colony, sometimes also referred to as a “mother country.”

can peoples of different ethnicities and religions together to “form a single political and administrative unit.”²³ In the African colonies with significant concentrations of European settlers,²⁴ the colonial government, with the help of colonists (most of whom were miners, farmers and planters), forcefully removed many African groups from their ancestral lands. The African groups were then resettled in what came to be known as “reservations,” in order to provide more land for European economic activities.²⁵

But, what was the main objective of colonialism? It was the maximization of the economic and political interests of the metropolitan economies and those of Europeans resident in the colonies—namely, settlers or colonists.²⁶ Colonialism was an

23. John Mukum Mbaku & Julius O. Ihonbere, *Introduction: Issues in Africa's Political Adjustment in the "New" Global Era*, in TRANSITION TO DEMOCRATIC GOVERNANCE, *supra* note 3, at 1.

24. For example, Southern Rhodesia (now Zimbabwe), South West Africa (now Namibia), and the four colonies—Cape of Good Hope, Natal, Orange River Colony, and Transvaal—which united to form the Union of South Africa in 1910. *Id.*

25. See generally GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981) (providing a comparative analysis of race relations in South Africa and the United States); BERNARD M. MAGUBANE, THE POLITICAL ECONOMY OF RACE AND CLASS IN SOUTH AFRICA (1979) (examining the impact of race and class on various population groups in South Africa, with specific emphasis on the policy of apartheid, which became official policy in 1948); PAUL MOSLY, THE SETTLER ECONOMIES: STUDIES IN THE ECONOMIC HISTORY OF KENYA AND SOUTHERN RHODESIA 1900–1963 (1983) (discussing the impact of settler agriculture on political economy in colonial Kenya and Southern Rhodesia); M.W. IMISHUE, SOUTH WEST AFRICA: AN INTERNATIONAL PROBLEM (1965) (examining the problems created by German and South African colonization of South West Africa).

26. In each colony, there were three major groups of Europeans. First, *settlers* or *colonists* were individual migrants from the various European countries that intended to make the colony their permanent home. Of course, if the colony was French, the majority of European settlers would usually be French. Second, there were *colonial administrators*—the various military and civilian elites that were sent to the colonies by the colonizer of record to administer the colony's affairs. And third, there were *Christian missionaries*. Most of the colonial settlers were planters, miners, industrialists, and traders. In the British and French colonies, the interests to be maximized were those of Britain and France, and of their citizens resident in the colonies respectively. Similarly, in the French colonies, the interests that dominated colonial policies were those of metropolitan France and French citizens located in the colony. It is important to note that in some European colonies in

insidious, cruel, despotic, and exploitative pact imposed on Africa and Africans by Europeans.²⁷ Colonial institutions were instruments of that exploitation and violence. For example, in his study of the police in colonial Nigeria, Tamuno concluded that the rise of crime and civil disorder provided the impetus for the establishment of instruments of violence, such as the police, by the United Kingdom.²⁸ Tamuno argued that increased levels of violence, brought about by "dynastic disputes" and interethnic conflicts contributed significantly to a rise in criminal activities and "had an important bearing on the origin, development and role of [the] modern police [in Nigeria]."²⁹ This characterization places the police force among the group of institutions that were supposed to maintain law and order and enhance peaceful coexistence in the colonies.³⁰

Africa, not all Europeans resident in the colonies supported the policies of the colonizer of record. For example, in the South African colonies that eventually united to form the Union of South Africa in 1910, there were regular conflicts between Afrikaners—Europeans of Dutch-German-French ancestry—and the colonial government in London over various issues, the most important of which included property rights in land and the treatment of Africans, or "native tribes." Some of these disagreements resulted in wars between Afrikaners and the British colonizers, such as the Anglo-Boer war of 1899–1902. *See generally* C.H. THOMAS, *ORIGIN OF THE ANGLO-BOER WAR REVEALED* (2nd ed., Echo Library 2006) (1900); S.B. SPIES, *THE ORIGINS OF THE ANGLO-BOER WAR* (1972).

27. Robert Fatton, Jr., *Liberal Democracy in Africa*, 105 *POL. SCI. Q.* 455, 457–58 (1990). Fatton argues that the Europeans imposed themselves and their institutions on Africans, and that the latter were never part of what has sometimes been referred to as a "mercantile pact," but were forcefully brought into the arrangement. *Id.* That arrangement produced, for Africans, years of humiliation, degradation, and infantilization. *Id.*

28. TEKENA N. TAMUNO, *THE POLICE IN MODERN NIGERIA 1861–1965: ORIGINS, DEVELOPMENT AND ROLE* 10 (1970).

29. *Id.*

30. In addition to the fact that such a characterization of the police and other colonial institutions misstates the appropriate role of these institutions, it also does not make an allowance for the examination of the role that colonialism played in the rise of a significant part of the social and political violence that came to envelop the colony. Colonialism was a brutal, exploitative, and humiliating system, designed specifically to enhance the ability of Europeans to exploit both Africans and their resources. It was inevitable that a system conceived in violence and implemented similarly would necessarily increase the various forms of violence in the colonies. Most of this so-called political and social violence was actually resistance by indigenous groups to the activities of the European interlopers. John Mukum Mbaku and Mwangi

The characterization of the police and other colonial institutions as instruments of law and order is part of the mistaken belief by apologists for European conquest of Africa that colonial occupation was actually a "civilizing" mission "designed to prevent African societies from degenerating into anarchy."³¹ Proponents of this view argue that European laws and institutions were designed to provide the colonial government with the wherewithal to "civilize" Africa's perpetually warring factions and help improve their quality of life, as well as provide them with the benefits of the European brand of Christianity.³² Viewed from this perspective, colonialism was far from being cruel or despotic; instead, it was a benevolent and development-enhancing enterprise.

On the contrary, colonialism was not a benevolent enterprise designed to benefit Africans. It was a violent and insidious effort by the Europeans to conquer Africans and exploit their resources for the benefit of the metropolitan economies. For example, according to Hugh E. Egerton, an expert on British imperial history, the "motives which prompted the European nations upon the field of colonization were in the main two, viz, the desire to win converts for the church, and the desire to win wealth for themselves."³³ Lord Frederick Lugard, who was responsible for administering Britain's policy of indirect rule in colonial Nigeria, posited that the colonies represented important sources of primary commodities for Britain's domestic industries and markets for excess output from metropolitan factories.³⁴ Of course, to win converts for the church and provide opportunities for Britons to enrich themselves, the government of Great Britain could have sought to establish diplomatic relations with various African kingdoms and states, with the latter allowed to maintain their independence. Once established, such inter-state relations, as they are today, would have allowed Christian missions to come to the African states and peacefully seek converts for their churches, and British entre-

S. Kimenyi, *Rent Seeking and Policing in Colonial Africa*, 8 INDIAN J. SOC. SCI. 277, 281 (1995).

31. *Id.*

32. *Id.*

33. Hugh E. Egerton, *Colonies and the Mercantile System*, in IMPERIALISM AND COLONIALISM 57, 57 (George H. Nadel & Perry Curtis eds., 1969).

34. LORD FREDERICK LUGARD, THE DUAL MANDATE IN TROPICAL AFRICA 7 (3d ed., 1926).

preneurs and traders would also have been able to seek opportunities to enter into mutually beneficial exchanges with their African counterparts. Of course, at this time in their histories, most European countries, including Britain, were practicing "mercantilism" and not "capitalism" as we understand it today, or as advocated by Adam Smith.³⁵ Hence, the concept of mutually beneficial trade exchanges would have been alien to existing practices at the time, since the popular approach was for each European country to acquire wealth at the expense of other countries and, notably, the colonies. Nevertheless, the British chose to employ violent conquest to achieve their objectives in Africa.

The late African political scientist and social commentator Professor Claude Ake argued that the colonial project was motivated primarily by the internal contradictions of capitalism as it was then practiced in the European countries.³⁶ He stated that:

[t]he transplanting of capitalism arises from those contradictions which reduce the rate of profit and arrest the capitalization of surplus value. Confronted with these effects, it was imperative that the capitalist, forever bent on profit maximization, would look for a new environment in which the process of accumulation could proceed apace. Capitalists turned to foreign lands attacked and subjugated them and integrated their economies to those of Western Europe.³⁷

Those who initiated the colonial project never pretended to be engaged in mutually beneficial trading arrangements between Africans and themselves. Even the European settlers who intended to make Africa their permanent home never pretended to treat Africans as co-equals in trade.³⁸ Instead, they planned to seize African lands and their other resources and force Africans to assist them in extracting profits for the benefit of the

35. SMITH, *supra* note 17.

36. CLAUDE AKE, *A POLITICAL ECONOMY OF AFRICA* (1981).

37. *Id.* at 19.

38. As argued by Crowder, the colonial state maintained armed troops in the colony, not for the defense of the territory against external aggression, but to control the "native tribes" and enhance the ability of the colonial officers to maintain peaceful coexistence and help the colonizer's citizens resident in the colony to engage in their economic activities. Michael Crowder, *Whose Dream Was It Anyway? Twenty-Five Years of African Independence*, 86 AFR. AFF. 7, 12 (1987).

metropolitan economies and the colonists. Take, for example, the view expressed by then French Governor of Algeria, General Bugead, in 1841, when he declared that “[w]henver the water supply is good and the land fertile, there we must place colonists without worrying about previous owners. We must distribute the lands [with] full title to the colonists.”³⁹ The French, like other European colonizers, used their superior military and police force to seize lands belonging to African groups and establish their colonies.⁴⁰ Of course, French settlers were not the only ones who viewed force and violence as a legitimate way to deal with Africa and Africans. Earl Grey, a well-known British colonial officer, summarized the views of his fellow settlers in southern Africa towards African populations when he declared that whenever and wherever there was conflict between English settlers and any African group, especially over land, the interests of Africans must be categorically ignored and that “facilities should be afforded the white colonist for obtaining the possession of land theretofore occupied by the Native tribes.”⁴¹ Throughout this period, the “Native tribes” were viewed by the European colonial elites, farmers, planters, miners, prospectors, and missionaries as peoples whose only function was to serve the interests of the Europeans. To function effectively and productively in the new role chosen for them by the conquerors, the “Native tribes” had to be converted to Europe’s brand and concept of Christianity—this was the job of the Christian missions. To serve the needs of the European entrepreneurial class, Africans had to forsake their customary and traditional pursuits and take up wage employment in European business enterprises, including performing domestic services in European households.⁴² In addition, Africans had to

39. RICHARD M. BRACE, *MOROCCO, ALGERIA, TUNISIA* 48 (1964).

40. See generally JENNIFER ELSON SESSIONS, *BY SWORD AND PLOW: FRANCE AND THE CONQUEST OF ALGERIA* (2011) (describing the subjugation of Algeria and the establishment of a French colony in Algeria); GEORGE BRENTON LAURIE, *FRENCH CONQUEST OF ALGERIA* (Naval & Military Press 2005) (examining the establishment of a French colony in Algeria).

41. MAGUBANE, *supra* note 23, at 71.

42. During the colonization of Cameroon by Germany and France, for example, both European countries actually forced Cameroonians to work for enterprises belonging to European planters, farmers, miners, traders, and the colonial government. The Germans, who colonized Cameroon before the French, imposed a forced labor system on the “native” populations. In order to deal with the problem of labor shortages, the German government in the

voluntarily give up their lands to the Europeans, or lose them through forced alienation.⁴³ Finally, self-actualization for Africans had to be based on each individual aspiring to achieve the European cultural ideal.⁴⁴

Professor Fatton describes colonial institutions as primarily "structures of exploitation, despotism, and degradation."⁴⁵ Considering that "the colonial state was conceived in violence ra-

colony of Kamerun imposed a tax on all native peoples that could only be settled in German marks. On July 1, 1903, the colonial state in Kamerun imposed a head tax of 3 marks per year on all men and unmarried women resident in the colony. As argued by Rudin, "[t]he requirement that every grown person, man or unmarried woman, capable of performing work must pay the tax shows the connexion of the tax with the labor problem." If a "native" person was unable to pay the tax, the law prescribed that the offending individual perform work to cover the amount of the tax. RUDIN, *supra* note 21, 321-45. The French used *forced labor* (*corvée*) extensively in the construction of railroads and the roads linking major cities. According to the French system, all males were required by law to provide the colonial government with ten days of free labor per year. The French *corvée* consisted of penal labor, prestation labor, and military labor. Of these three, prestation was the most economically important. The French imposed a labor tax in Cameroon that was similar to the one that had been established by the Germans: all males between the ages of 18 and 60 years were forced to pay an annual "tax" under which each person was required to provide a minimum of ten days of free labor every year. Individuals affected by this tax could pay the colonial government the equivalent of those labor services in currency. Most "natives" usually did not have the currency to pay, and hence were forced to work on either private or public projects, sometimes for more than ten days. VICTOR T. LEVINE, *THE CAMEROONS: FROM MANDATE TO INDEPENDENCE* 104-10 (1964). See also Mbaku & Kimenyi, *supra* note 30, at 288.

43. For the forced expropriation of African lands by French colonists in North Africa, with special emphasis on Algeria, see generally BRACE, *supra* note 39. Consider the statement by French Governor of Algeria, General Bugead: "[w]henver the water supply is good and the land fertile, there we must place colonists without worrying about previous owners. We must distribute the lands [with] full title to the colonists." Also note that similar sentiments about the expropriation of lands belonging to African ethnic groups were expressed by other colonizers in Africa, including the British. *Id.* at 48. See generally Bernard M. Magubane, *THE POLITICAL ECONOMY OF RACE AND CLASS IN SOUTH AFRICA* (1979).

44. See generally LEVINE, *supra* note 42 (examining, inter alia, French colonial policy in the U.N. Trust Territory of Cameroons under French administration; note, especially, France's policy of association—*politique d'association*).

45. Fatton, Jr., *supra* note 27, at 457.

ther than by negotiation,”⁴⁶ the laws and institutions that facilitated this process had to themselves be instruments of violence. First, the laws were imposed externally by the colonialists without any input from Africans. Second, the laws and institutions were designed specifically to disenfranchise Africans and enhance European control of the colonies. Third, the languages of the colonial powers were introduced for use in social, economic, and political discourse. Fourth, a new religion, Christianity, was introduced to replace African traditional religions. Finally, African ethnic groups were forcefully brought together to form easily controlled and administered, economic and political units called colonies.

Given the fact that Europeans were determined to use the coercive apparatus of the state as a tool for the allocation of colonial resources, institutions of law and order, such as the police and the judiciary, evolved as instruments of violence to enhance the ability of the Europeans to “conquer, control, subjugate and exploit Africans.”⁴⁷ Within each European colony in Africa, there were never the types of benevolent public institu-

46. Crowder, *Whose Dream*, *supra* note 38, at 11. According to Crowder, the level of violence employed by the Europeans to create colonies in Africa was often quite extraordinary: “This violence was often quite out of proportion to the task in hand, with burnings of villages, destruction of crops, killing of women and children, and the execution of leaders. . . . Any form of resistance was visited by punitive expeditions that were often quite unrestrained by any of the norms of warfare in Europe.” *Id.* at 11–12. *See also* MICHAEL CROWDER, *WEST AFRICA UNDER COLONIAL RULE* (Hutchinson 1981) (describing the colonial enterprise as it functioned in the West African colonies).

47. Mbaku & Kimenyi, *supra* note 30, at 282–83. Mbaku and Kimenyi examine the emergence of the police force in the British colony of Nigeria and show how it was developed, specifically as an instrument of violence, to enhance British exploitation of the resources of the new colony for metropolitan development needs. The police force that emerged in the colony of Nigeria, they argued, was never a benevolent public institution dedicated to maintaining law and order and ensuring the peace. For a contrary view, see SIR CHARLES JEFFRIES, *THE COLONIAL POLICE 198–99* (1952). Jeffries argues that the colonial police was a benevolent institution whose main function was to “act impartially in the interest of the community as a whole, to preserve and re-establish the rule of law and order.” Ahire, however, questions Jeffries’ assertions, and argues that anyone who sees the colonial police as a “legal and constitutional imperative ignores the fact that the police in these [colonies] were established by force, despite indigenous resistance to them.” Philip T. Ahire, *Policing and the Construction of the Colonial State in Nigeria, 1860–1960*, 7 J. THIRD WORLD STUD. 151, 156 (1990).

tions that were expected to maintain law and order, and enhance the ability of each of the colony's population groups to live together peacefully, maximize their values, and create the wealth that they needed to meet their needs.⁴⁸ Instead, what came to characterize governance in the colonies were mainly institutions designed to enhance European exploitation, infantilization, and denigration of Africans, all for the benefit of the metropolitan economies.

B. Independence and the Hope for a New Governance Dispensation

Independence was expected to grant Africans several benefits, the most important of which was the "opportunity to rid themselves of not only the Europeans, but also of their laws and institutions and then, develop and adopt, through a democratic process—specifically, a people-driven, bottom-up, participatory, and transparent institutional reform process—institutional arrangements based on their own values, aspirations, traditions, and customs."⁴⁹ The hope of the African masses, who during colonialism had been subjected to horrendous violence, "infantilized[,] stigmatized by their color, and with no recognizable rights,"⁵⁰ was that the new post-independence laws and institutions would provide the wherewithal for peaceful coexistence of each new country's diverse population groups, restore their fundamental rights, and create opportunities for self-actualization. This would provide an enabling environment for the development and nurturing of an indigenous entrepreneurial class to create the wealth needed to confront mass poverty. New post-independence institutions were also expected to adequately constrain civil servants and political elites, so that they would serve only the national interests and not engage in

48. Robert Peel, who created the modern police force in the United Kingdom, considered the police a benevolent institution whose main function was to prevent crime and suppress evil. See CHARLES REITH, *A SHORT HISTORY OF THE BRITISH POLICE* 109 (1948) (discussing, inter alia, Peel's creation of the force and crediting "the unique relationship with the public which the police have created and are at constant pains to maintain" as the "basic secret of the success and efficiency of the British police."). See also ERIC J. EVANS, *SIR ROBERT PEEL: STATESMANSHIP, POWER AND PARTY* (1991).

49. Mbaku & Ihonvbere, *Introduction: Issues in Africa's "New" Global Era, in TRANSITION TO DEMOCRATIC GOVERNANCE IN AFRICA*, *supra* note 3, at 2.

50. Fatton, Jr., *supra* note 27, at 458 (semicolon omitted).

corruption, rent seeking, and other forms of opportunism to illegally secure income and wealth for themselves.⁵¹

The post-colonial state was expected, by its citizens, to devote all its policies to national integration, nation building, and the improvement of the welfare of all citizens. These were the issues that gave impetus to the decolonization project—the need to rid the colonies of the Europeans and their opportunistic policies, and hand over the apparatus of government to Africans who would then spearhead the effort to develop and modernize the new countries. To accomplish these objectives, government would be “controlled and directed not by center elites and their [foreign] benefactors, but by popular forces with significant allowance made for the full and effective participation of the relevant stakeholder groups—those whose lives would be governed or affected by these institutions.”⁵²

Unfortunately, this view of the post-colonial state was shared primarily by the masses who were not in a position to effect the changes necessary to produce development-oriented and constitutionally-limited states. This is evidenced by the types of behaviors in which the continent’s post-independence bureaucrats and political elites preferred to engage. In the post-independence period, corruption and rent seeking had become endemic in virtually all African countries. Most of these opportunistic activities represented efforts by ruling elites to subvert national laws to enrich themselves at the expense of the rest of the people. Given the fact that such elites approached decolonization and independence as an opportunity for them to capture the evacuated structures of colonial hegemony, and use them to redistribute income and wealth in their favor, they did not make any effort to ensure that the critical domains were properly transformed; nor did they insist on democratic constitution-making either in the pre- or post-independence period.⁵³

51. Mbaku & Ihonybere, *Introduction: Issues in Africa’s “New” Global Era*, in *TRANSITION TO DEMOCRATIC GOVERNANCE*, *supra* note 3, at 2.

52. *Id.* at 2.

53. For example, during the struggle for independence in the U.N. Trust Territory of Cameroons under French administration, many of the territory’s political elites, including Ahmadou Ahidjo, who became the country’s first president, were willing to forego any efforts at state reconstruction and institutional development (i.e., they were willing to postpone effective constitution-making) and gain independence. See generally MBAKU, *INSTITUTIONS AND DEVELOPMENT*, *supra* note 1, at 119. The hope was that once independence

In fact, all of the former French colonies in sub-Saharan Africa except Guinea accepted the offer made by the then French president, Charles de Gaulle, of free association as autonomous republics within the French Community (*Communauté française*), and as a consequence, did not engage their populations in democratic constitution-making, choosing instead to use the French Constitution of 1958 as the foundation for their laws and institutions. Such a process effectively deprived the citizens of the francophone countries in sub-Saharan Africa of the opportunity and right to select their own laws and governance institutions.⁵⁴

In each new country, the law was supposed to help Africans organize their private lives, provide them with mechanisms to peacefully resolve conflicts arising from sociopolitical interaction, including those from trade and other forms of exchange, and adequately constrain the state so that its custodians—namely, civil servants and political elites—could not behave with impunity. Instead, what they got were various forms of laws and institutions inherited from the colonial state, all of which were incapable of promoting law and order and providing the enabling environment for the creation of wealth. These

was achieved and governance structures were in the hands of indigenous elites, the latter would engage the people in democratic constitution-making to produce appropriate—namely, democratic—institutional arrangements for governance. That, unfortunately, never happened. In fact, in the case of Cameroon, the 1960 Constitution, which was based on the Constitution of the French Fifth Republic and whose compacting did not involve any robust constitutional discourse, remains the foundation of the country's 1972, 1996, and 2008 constitutions. The latter is the country's present constitution. Throughout its existence as a sovereign country, Cameroon has never undertaken democratic constitution-making. Instead, the country's political elites have engaged in opportunistic institutional "reforms" to produce laws and institutions that have allowed them to monopolize the supply of legislation and effectively plunder the national economy for their own benefit. See generally LEVINE, *supra* note 42.

54. LeVine questions the "appropriateness of modeling the Cameroun constitution so closely on that of the [French] Fifth Republic." Although France's 1958 Constitution—the Constitution of the French Fifth Republic—was designed "in the context of the constitutional crisis that brought De Gaulle to power," the "circumstances surrounding the writing of the Cameroun constitution were not in any way analogous to those existing in France in 1958." LEVINE, *supra* note 42, at 224–27. See also Victor T. LeVine, *The Fall and Rise of Constitutionalism in West Africa*, 35 J. MOD. AFR. ST. 181, 184–85 (1997) [hereinafter LeVine, *The Fall and Rise of Constitutionalism*].

laws and institutions, after all, were instruments of oppression used by the Europeans during the colonial period to enrich themselves at the expense of the inhabitants of the colonies. The African elites who captured the apparatus of government at independence turned these same European-inspired laws and institutions into instruments of plunder, and proceeded to use them to oppress and infantilize the masses as well as enrich themselves, just as the Europeans had done.⁵⁵

C. The Policy Imperative in Africa Today

While African countries currently face a plethora of problems, the most important are how to (1) manage ethnic and religious diversity and provide for peaceful coexistence; (2) create the wealth that these countries need to deal with poverty and improve national living standards; (3) establish entrepreneurial sectors capable of providing a solid foundation for economic growth and development; (4) minimize corruption, rent seeking, financial malfeasance—particularly in the public sector—and deal effectively with other forms of political opportunism, which have emerged as important constraints to governance and economic transformation; (5) promote the protection of fundamental and human rights; and (6) significantly improve the continent's participation in the international economy and global affairs.

One can argue that for Africa to effectively and fully deal with these problems requires the cooperation of the international community. That may be true, especially given the influence of international organizations such as the World Bank⁵⁶

55. As argued by Fatton, "The rapid disintegration of the inherited parliamentary model generated the rise of personal rule shaped by the idiosyncrasies of the ruler and his entourage rather than by effective political institutions and regulations." In fact, most of the inherited political systems in Africa degenerated shortly after independence into authoritarian systems that effectively allowed the ruling elites to create and use patron-client networks for resource extraction and self-enrichment. Fatton, Jr., *supra* note 27, at 459–60.

56. The International Bank for Reconstruction and Development (also called the World Bank) and the International Monetary Fund ("IMF") are generally referred to as the Bretton Woods Institutions because they were founded at Bretton Woods, New Hampshire, United States, in 1944. While the IMF's main mission was to ensure that global trade was not interrupted and to provide financial assistance to countries to deal with temporary balance of payments problems, the World Bank was tasked with promoting eco-

and International Monetary Fund,⁵⁷ as well as the developed market economies of the West, which, along with their multinational companies, continue to dominate investment in the African countries. Additionally, in recent years, the PRC⁵⁸ has significantly increased its involvement and influence in the African economies. However, effective economic, political, and social development in Africa requires that Africans take ownership of their problems and seek appropriate ways to deal with them. They must recognize that eliminating poverty in the continent and significantly improving the living standards of the people must be based on and informed by full participation of all Africans in the policy design and implementation process. Africans cannot rely on the benevolence of external actors in order to realize the solutions to these problems. Specifically, each African country must engage its citizens in the process of state reconstruction to provide institutional arrangements that

economic growth and development in the post-World War II period, primarily in the poor and developing countries that emerged from colonial rule in the post-war period. The IMF has been involved in many projects in Africa. The most important of them have been the structural adjustment programs ("SAPs"), which were designed to enhance the ability of African countries to service their external debts and improve macroeconomic performance. *See generally* MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 1, at 141–75 (discussing, among other things, the impact of the IMF's structural adjustment programs on economic development in Africa in the mid-1980s and early 1990s); Kevin Danaher, *Introduction*, in 50 YEARS IS ENOUGH: THE CASE AGAINST THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND 1, 2 (Kevin Danaher ed., 1994) (arguing that despite the fact that the Bretton Woods institutions were given clear and well-defined mandates, they nevertheless proceeded to pursue other objectives, which included trying to integrate economies of the developing countries into the "capitalist world economy"); STRUCTURAL ADJUSTMENT, RECONSTRUCTION AND DEVELOPMENT IN AFRICA (Kempe Ronald Hope, Sr. ed., 1997) (arguing that the approach to development and balance-of-trade adjustment taken by the World Bank and the IMF is not appropriate for the African countries). The World Bank is a major supporter of economic development in Africa. In 2010, the Bank committed US\$11.5 billion in loans to development projects in Africa. *See* News Release, World Bank Group, Unprecedented Support from the World Bank to Help Africa Recover from the Crisis (July 1, 2010).

57. *See* Danaher, *supra* note 56; MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 1, at 161–63.

58. CHINA INTO AFRICA: TRADE, AID, AND INFLUENCE (Robert I. Rotberg ed., World Peace Foundation 2008) (examining the emerging relationship between the People's Republic of China and Africa, especially in the areas of trade, development aid, and political influence).

(1) can enhance the effective management of ethnic and religious diversity, as well as ensure the peaceful coexistence of all population groups; (2) establish and maintain a fully functioning private sector, which will create the wealth that is needed to deal with mass poverty and help eradicate poverty; (3) minimize all forms of political opportunism, especially corruption, rent seeking, and public financial malfeasance, all of which are major constraints to economic growth and wealth creation; (4) ensure that the people's fundamental and human rights are constitutionally guaranteed and fully protected; and (5) enhance Africa's participation in and influence on international trade and global affairs.

While the objectives of this research have already been stated, it is important to note two things. First, that this paper calls attention to the need for Africans to revisit existing approaches to wealth creation and economic growth, as well as poverty alleviation and eventual eradication in Africa. And second, this paper shows that while international cooperation is important for success in fighting poverty and improving living conditions on the continent, Africans must recognize that international support—for example, through foreign investment, development aid, and grants—is a necessary, but not sufficient condition. Sufficiency mandates that each African country provide itself with institutional arrangements that guarantee the rule of law. Thus, part of Africa's effort to eliminate poverty and enhance human development must involve the development, through a democratic constitution-making process, of institutional arrangements that guarantee the rule of law.

As mentioned earlier, this study employs a constitutional political economy model, which posits that rules⁵⁹ have a significant influence on and to a great extent determine outcomes resulting from sociopolitical interaction in any society. Constitutional political economy deals with the rules that constrain the “economic and political relationships among persons” within a country or community.⁶⁰ Laws and institutions provide individuals living in a society with the wherewithal to organize their private lives and maximize their values—for example, by

59. The eighteenth century Scottish social philosopher and pioneering political economist, Adam Smith, called these rules, “laws and institutions.” See SMITH, *supra* note 17, at 106.

60. BRENNAN & BUCHANAN, *supra* note 18, at 7.

engaging in mutually beneficial exchanges or undertaking entrepreneurial activities to create the wealth that they need. These institutions function within a context in which they do not constrain or prevent others from achieving their own objectives.⁶¹ Brennan and Buchanan argue that in enhancing the ability of individuals to maximize their interests, rules also serve the "negative function of preventing disastrous harm."⁶²

Throughout the continent, Africans are confronted with governmental systems that exploit, denigrate, pauperize, and infantilize them. Part of the problem comes from the fact that many Africans live in countries or societies with rules that they either do not understand, or the existence of which they are not aware.⁶³ In many African countries, only a select group of individuals, primarily urban-based elites who control the government, take part in the selection of the laws and are familiar with them. These ruling elites regularly subvert the laws to redistribute income and wealth in their favor. In the process, they violate the fundamental human rights of their fellow citizens.⁶⁴ Effective laws, those that enhance peaceful coexistence and promote wealth creation, are those that adequately constrain the state and prevent civil servants and political elites from engaging in the various forms of opportunism, such as rent seeking, corruption, and financial malfeasance. Of course, the majority of citizens must voluntarily accept and respect these laws; otherwise, policing to enforce compliance would be a very difficult and odious task.⁶⁵ For most citizens to accept

61. *Id.* at 14.

62. *Id.*

63. For example, throughout the continent, many poor people are regularly denied access to services at public hospitals because they are not able to pay the bribes demanded by doctors, nurses, and other hospital staff. This takes place despite the fact that there are laws against such conduct by staff at public institutions, including hospitals. Of course, civil servants are able to easily act with impunity because existing laws do not adequately constrain them. See MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 87–116 (examining corruption and its impact on African economies).

64. See, e.g., MBAKU, INSTITUTIONS AND REFORM IN AFRICA, *supra* note 1 (examining, inter alia, the monopolization of the supply of legislation by center elites and the impact of that approach to institutional reforms on African economies).

65. Of course, not all citizens have to voluntarily accept and respect the law. The critical point is that in order to enhance policing, it is important that a majority of citizens voluntarily accept and respect the law. The minority that does not can be dealt with and forced to comply by the country's coun-

and respect the laws, the laws must reflect their values, customs, and traditions, their aspirations, interests, and worldview, and must be relevant to the problems that they must deal with on a regular basis, providing them with necessary tools to organize their private lives. Such laws and institutions can only be produced through a bottom-up, participatory, inclusive, and people-driven institutional reform process.

The creation of the wealth that is needed to confront poverty and improve the living standards of Africans requires that each country develop and adopt institutional arrangements that guarantee the rule of law. This study will examine the elements of the rule of law and show its relevance to the creation of wealth, and hence, the minimization of poverty in Africa.

II. THE RULE OF LAW

A. Introduction

Throughout history, legal philosophers have worked hard to define the concept called the “rule of law.” British jurist and legal philosopher Albert Venn Dicey is credited with providing the logical foundation on which the modern definition of the concept of the rule of law is based. He argued that the rule of law must embody three important concepts: first, the law is supreme; second, all citizens are equal before the law; and third, a recognition and acceptance of the principle that the rights of individuals must be established through court decisions.⁶⁶

On November 16, 2006, the Rt. Hon. Lord Bingham of Cornhill KG delivered the sixth lecture in honor of Sir David Williams at the Center for Public Law, University of Cambridge, titled “The Rule of Law.”⁶⁷ In that lecture, Lord Bingham stated that “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit

teracting agencies, such as the police and the court system. Voluntary compliance significantly minimizes the costs of policing and is extremely important for the African countries because they have limited resources to devote to enforcement. *See* MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 13–14.

66. ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 179–201 (Macmillan 1959) (1885).

67. Thomas Bingham, Rt. Hon. Lord, House of Lords, Sixth Sir David Williams Lecture: The Rule of Law (Nov. 2006), *available at* <http://www.cpl.law.cam.ac.uk/Media/THE%20OF%LAW%2006.pdf>.

of laws publicly and prospectively promulgated and publicly administered in the courts.”⁶⁸ He set out eight sub-rules, which he argued underlie the general principle of the rule of law. These sub-rules are:

1. “the law must be accessible and so far as possible intelligible, clear and predictable”;
2. “questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion”;
3. “the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation”;
4. “the law must afford adequate protection of fundamental human rights”;
5. “means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve”;
6. “ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers”;
7. “that adjudicative procedures provided by the state should be fair”; and
8. “the existing principle of the rule of law requires compliance by the state with its obligations in international law, the law which whether deriving from treaty or international custom and practice governs the conduct of nations.”⁶⁹

In a 2009 article, Professor Stein⁷⁰ argued that the most important aspect of Lord Bingham’s definition of the rule of law is that “the law is superior, applies equally, is known and predictable, and is administered through a separation of powers.”⁷¹ Professor Stein then goes on to provide his own definition of the rule of law. He argues that a country governed by institutional arrangements that guarantee the rule of law is characterized by the following:

68. *Id.* at 5.

69. *Id.* at 6–29.

70. Robert Stein, *Rule of Law: What Does It Mean?* 18 MINN. J. INT’L L. 293 (2009).

71. *Id.* at 301.

1. The law is superior to all members of society, including government officials vested with either executive, legislative, or judicial power.
2. The law is known, stable, and predictable. Laws are applied equally to all persons in like circumstances. Laws are sufficiently defined and government discretion sufficiently limited to ensure the law is applied non-arbitrarily.
3. Members of society have the right to participate in the creation and refinement of laws that regulate their behaviors.
4. The law is just and protects the human rights and dignity of all members of society. Legal processes are sufficiently robust and accessible to ensure enforcement of these protections by an independent legal profession.
5. Judicial power is exercised independently of either the executive or legislative powers and individual judges base their decisions solely on facts and law of individual cases.⁷²

The American Bar Association (“ABA”) has also shown an interest not only in tackling the issue of defining the rule of law, but also in helping promote its implementation outside the United States. The ABA has taken a leadership role in the movement to help transition countries reform, transform, and reconstitute their legal systems. Finding a workable definition for the rule of law is part of that effort.⁷³ The ABA, however, argues that “[t]he rule of law does not depend upon a U.S.-style separation of powers. . . . The key point is that every form of government has to have some system to ensure that no one in the government has so much power that they can act above the law.”⁷⁴ The rule of law consists of several elements, but the most important of them, especially in Africa where bureaucratic corruption has become endemic and political elites and civil servants behave with impunity, is that no one, not even the people who hold leadership positions in government, including the executive, judiciary officers, and legislators, is above the law—the law is supreme.

72. *Id.* at 302.

73. See A.B.A. Division of Public Education, *Dialogue on the Rule of Law Part I: What is the Rule of Law?*, available at http://www.americanbar.org/groups/public_education/dialoguesruleoflaw.html (last visited Apr. 24, 2013).

74. *Id.* at 4.

Joseph Raz, who studied legal philosophy at Oxford University under H. L. A. Hart, and later became a Professor of Philosophy of Law at Oxford, provided a definition for the rule of law that encapsulates eight basic guiding principles, namely:

1. All laws should be prospective, open, and clear.
2. Laws should be relatively stable.
3. The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules.
4. The independence of the judiciary must be guaranteed.
5. The principles of natural justice must be observed.
6. The courts should have review powers over the implementation of the other principles.
7. The courts should be easily accessible.
8. The discretion of crime-preventing agencies should not be allowed to pervert the law.⁷⁵

Law Professor Erwin Chemerinsky, a well-known expert on constitutional law, argues that although he agrees with the guiding principles advanced by Professor Raz, he nevertheless believes that these principles “do not really provide much guidance.”⁷⁶ According to Chemerinsky, “Raz’s idea that laws should be relatively stable gives no indication of when it is appropriate to change laws, whether by overruling precedent or revising statutes.”⁷⁷ He argued further that in order to formulate a practical and workable definition for the rule of law, one must consider or address a specific set of propositions. These are:

1. The rule of law requires the formation of general laws according to set procedures.
2. Laws must be general, prospective, and clearly stated.
3. The government must obey the laws in its actions.
4. Government must not infringe the rights of individuals.

75. Erwin Chemerinsky, *Toward a Practical Definition of the Rule of Law*, 46 JUDGES J. 4, 5 (2007) (quoting Joseph Raz, *The Rule of Law and Its Virtue*, in *LIBERTY AND THE RULE OF LAW* 3–21 (Robert L. Cunningham ed., 1979)).

76. *Id.*

77. *Id.*

5. The government must follow fair procedures in depriving a person of life, liberty, or property.
6. The government must treat likes alike and unalikes unlike.
7. The government must provide a fair system to resolve private disputes.
8. An independent judiciary is essential to the rule of law.⁷⁸

In recent years, the United Nations has also become interested and involved in the movement to formulate a definition for the rule of law. According to the U.N.,

[t]he ‘rule of law’ refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁷⁹

For most countries around the world, including the highly developed democracies, the rule of law is an ideal that they hope and seek to achieve, but it is not unusual to find highly advanced democracies that are struggling to guarantee the rule of law within their legal systems. The American Republic—the United States of America—which came into being in 1776, was governed for many years by a constitution that failed to protect the fundamental and human rights of all its citizens. Although the new country’s constitution was specifically designed to protect the rights of its citizens, slavery was widely practiced throughout most of the country. In fact, the U.S. Constitution

78. *Id.* at 6–9.

79. Robert H. Wagstaff, *The Aftermath of Terrorism: Rule of Law Applies to Detainees in U.S. and U.K.*, 12 Alaska B. Rag 24, 24 (2010) (quoting U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶6, U.N. Doc. S/2004/616.23 (Aug. 2004)).

expressly sanctioned the institution of slavery—slavery and the slave trade were legal in the United States until 1808.⁸⁰

B. The Elements of the Rule of Law

The heart of the rule of law is that “the government must obey the law in its actions.”⁸¹ This view flows directly from the belief that the law is supreme. Justice Anthony M. Kennedy, Associate Justice of the U.S. Supreme Court, has stated that “[t]he Law rests upon known, general principles applicable on equal terms to all persons. It follows that the Law is superior to, and thus binds, the government and all of its officials.”⁸² The *supremacy of law* is the first element of law that is identified for the purposes of this article.

A country is not likely to be able to “maintain the rule of law if its citizens do not [accept] and respect the law.”⁸³ If, in a country, the majority of citizens do not accept and respect the law, it would be very difficult for the government agencies whose job it is to maintain law and order to successfully perform their duties. Policing for compliance, for example, would be extremely costly and the government would likely be forced to devote a significant portion of national income to compliance activities, a process that can reduce expenditures on important sectors of the economy such as health and human capital development. Hence, the second element of the rule of law is that *the majority of citizens must accept and respect the law*.

The U.S. Supreme Court has contributed significantly to the development of modern rule of law jurisprudence. In *United States v. United Mine Workers*,⁸⁴ a case that was decided in 1947, the U.S. Supreme Court held that:

In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed

80. U.S. CONST, art. I, §9. Slavery was eventually abolished in the United States and the country's Constitution was duly amended to afford descendants of slaves equal protection under the law.

81. Chemerinsky, *supra* note 75, at 6.

82. Stein, *supra* note 70, at 299 (quoting Anthony M. Kennedy, Written Constitutions and the Common Law Tradition, 20th Sultan Azlan Shah Law Lecture in Kuala Lumpur, Malaysia 11 (Aug. 10, 2006)).

83. A.B.A. Division of Education, *supra* note 73, at 5.

84. *U.S. v. United Mine Workers*, 330 U.S. 258 (1947).

to determine for himself what is law, every man can. That means first chaos, then tyranny.⁸⁵

Many of the definitions of the rule of law proffered by various scholars, and examined above, share the U.S. Supreme Court's assertion in *United States v. United Mine Workers*⁸⁶ that "[t]here can be no free society without law administered through an independent judiciary."⁸⁷ For example, among Professor Chemerinsky's eight key propositions to be addressed in an effort to formulate a practical definition for the rule of law is: "An independent judiciary is essential to the rule of law."⁸⁸ In arguing that "[t]he 'rule of law' refers to a principle of governance in which all persons, institutions and entities, public or private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, . . .",⁸⁹ the United Nations also acknowledges judicial independence as an essential and critical element of the rule of law.

Thus, the third element of the rule of law is *judicial independence*. In many African countries, even where the constitution specifically makes allowances for separation of powers and guarantees judicial independence, the judiciary is still subject to, or controlled by, the executive branch of government. In many of these countries, the executive employs the judiciary as an instrument to control citizens and enhance the regime's ability to monopolize power. Little emphasis is placed on the administration of justice.⁹⁰

85. *Id.* at 312.

86. *Id.*

87. *Id.*

88. Chemerinsky, *supra* note 75, at 8.

89. Wagstaff, *supra* note 79, at 33 (quoting U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616.23 (Aug. 2004).

90. Consider the case of the Republic of Cameroon. According to the country's constitution—Constitution of the Republic of Cameroon 2008—judiciary independence is expressly guaranteed. However, the same constitution vests the president of the republic with the power to guarantee the independence of the judiciary. CONSTITUTION OF THE REPUBLIC OF CAMEROON, arts. 37(2), 37(3). Cameroon, of course, is not the only country in Africa with such an approach to "judiciary independence." According to Article 69 of the Gabonese Constitution, "La Président de la République est le garant de l'indépendance du pouvoir judiciaire." ("The President of the Republic is the guarantor of the independence of the judiciary.") CONSTITUTION DE LA RÉPUBLIQUE GABONAISE,

Law functions effectively only if citizens are aware of, understand, and appreciate the law. Governments can help citizens understand and appreciate the law through broad-based education programs undertaken at schools and in community-based adult education centers. Such programs, however, should only be designed to supplement, but not replace, participatory and inclusive constitution-making. First, citizens must be provided the facilities to participate fully and effectively in constitution-making. Second, the enactment of laws in the post-constitutional society should be open and transparent, making allowances for as much participation as possible. Finally, the "laws [must be] applied predictably and uniformly,"⁹¹ and not capriciously or arbitrarily. The fourth and fifth elements of the rule of law are *openness and transparency*, and *predictability*.

According to the ABA, as a legal principle, the rule of law developed in the United States "around the belief that a primary purpose of the rule of law is the protection of certain basic rights."⁹² In similar fashion, the decolonization projects of the 1950s and 1960s in Africa were based on the desire of Africans, first, to rid themselves of the European-induced laws and institutions, and, second, to replace them with institutional arrangements designed by Africans themselves. The hope was that each country would develop and adopt laws and institutions that would enhance the ability of its diverse citizens to live together peacefully and create wealth to deal with poverty and improve living conditions.⁹³ Such post-independence insti-

art. 69 (last amended by Law No. 13/2003 of August 19, 2003), *available at* <http://www.wipo.int/wipolex/en/details.jsp?id=7439> (last visited Mar. 15, 2013). Similarly, Article 89 of the Constitution of the Islamic Republic of Mauritania states that "Le pouvoir judiciaire est indépendant du pouvoir législatif et du pouvoir exécutif. Le Président de la République est garant de l'indépendance de la Magistrature." ("The judiciary is independent of the legislative and executive branches. The President of the Republic shall guarantee the independence of the judiciary.") CONSTITUTION OF THE ISLAMIC REPUBLIC OF MAURITANIA, art. 89, *available at* <http://www.wipo.int/wipolex/en/details.jsp?id=7436> (last visited Mar. 15, 2013). In fact, virtually all the constitutions of the former French colonies in Africa assign to the executive the job of guaranteeing judicial independence.

91. A.B.A. Division of Public Education, *supra* note 73, at 5.

92. *Id.*

93. In a 1987 paper, Michael Crowder examined political economy in Nigeria as just one example of a country that failed to live up to the hopes of its citizens and those who believed that the new state would use its independence to provide structures capable of enhancing peaceful coexistence and sus-

tutional arrangements were expected to adequately constrain the state, effectively preventing civil servants and political elites from engaging in corruption, rent seeking, and other forms of opportunism; and to guarantee the protection of fundamental and human rights, as well as provide citizens with the wherewithal for self-actualization. Of course, the new laws and institutions were also expected to adequately constrain non-state actors so that they could not infringe on the rights of their fellow citizens, especially those who had historically been marginalized and abused, such as women, and ethnic and religious minorities.⁹⁴

Instead, constitution-making in the pre- and post-independence periods was elite-driven, top-down, and non-participatory.⁹⁵ The outcome of such a rules selection process

tainable development. Crowder states that he chose Nigeria “as an example of the disillusion that has attended the first twenty-five years of independence not only among the former colonial rulers who transferred power but also among those who inherited that power, because it contains a quarter of the population of the African continent. Its experience has unhappily not been atypical but rather the norm for the majority of African countries.” Crowder, *Whose Dream*, *supra* note 38, at 8.

94. See Mbaku & Ihonvbere, *Introduction: Issues in Africa’s Political Adjustment in the “New” Global Era*, in *TRANSITION TO DEMOCRATIC GOVERNANCE*, *supra* note 3, at 1–2 (arguing that “[m]any Africans, especially the historically marginalized and deprived (e.g., women, rural inhabitants, ethnic minorities, and those forced to live on the urban periphery), believed that independence was an opportunity to rid themselves of not only the Europeans, but also of their laws and institutions and then, develop and adopt, through a democratic process—a people-driven, bottom-up, participatory, and transparent institutional reform process—institutional arrangements based on their own values, aspirations, traditions, and customs”).

95. In the French colonies, for example, constitution-making degenerated into the adoption of the constitutional platform offered to these colonies by General Charles de Gaulle. It was only Guinea that voted against de Gaulle’s offer of association as autonomous political units within the French Community. In British colonies, constitution-making was carried out primarily in London and away from the people—the African peoples were represented by urban-based African elites, many of whom were actually chosen by the colonial government, instead of by the people. In the colonies with significant populations of settlers, the settlers dominated and sometimes controlled constitution-making. See, e.g., LeVine, *supra* note 42, at 183–85 (examining constitution-making in the U.N. Trust Territory of Cameroons under French administration); DENNIS V. COWEN, *THE FOUNDATIONS OF FREEDOM: WITH REFERENCE TO SOUTHERN AFRICA* 43–82 (1961) (providing insight into constitutional discourse in the colonies that united in 1910 to form the Union of South Africa).

was institutional arrangements that failed to adequately constrain the state and did not provide each new country's diverse population groups with the mechanisms for peaceful coexistence. Specifically, these post-independence laws and institutions, especially in the francophone countries, created so-called imperial presidencies with power concentrated in the center, and failed to protect the fundamental and human rights of citizens.⁹⁶ Thus, the sixth element of the rule of law is the *protection of the fundamental rights of citizens*.

III. THE RULE OF LAW AS A FOUNDATION FOR DEVELOPMENT IN AFRICA: OVERVIEW

A. Introduction

The struggle against poverty and deprivation in Africa is actually a fight to create wealth—that is, a fight to establish within each country viable and fully functioning entrepreneurial communities. With increased wealth, and given the appropriate institutional environment, Africans can invest in human development. The additional resources can be used to increase spending on nutrition, especially for infants and children; education, especially at the primary and secondary levels; clean water; women's health, especially on prenatal care; and the social overhead capital that is needed to enhance each country's ability to create more wealth.

Fighting poverty and improving living conditions, especially for historically marginalized groups and communities,⁹⁷ are the most important public policy priorities for African countries. During most of the post-independence period, African countries have relied heavily on resource flows from abroad, especially in the form of official development assistance, as well as food aid, to deal with poverty and poverty-related problems.⁹⁸ The most

96. See, e.g., H. Kwasi Prempeh, *Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa*, 35 HASTINGS CONST. L.Q. 761, 806 (2008); LeVine, *The Fall and Rise of Constitutionalism*, *supra* note 54, at 196; LEVINE, *supra* note 42, at 224–27.

97. Such groups and communities include women, infants and children, rural inhabitants, the urban poor, and ethnic and religious minorities.

98. For a critique of foreign aid's effectiveness as a tool for the fight against poverty, see Doug Bandow, *The Fallacy of Foreign Assistance Programs as Instruments of Economic Growth and Social Stability: The Case of*

effective way for Africans to deal with poverty, especially on a sustainable basis, is for each economy to significantly improve its capacity to create wealth. That capacity includes, and is dependent significantly on, the existence within each country of institutional arrangements that guarantee the rule of law.⁹⁹

B. The Supremacy of Law

By far the most important obstacles to the creation of wealth and improvement of the human condition in Africa are bureaucratic and political corruption, rent seeking, public financial malfeasance, and other forms of opportunism perpetuated by civil servants and political elites, usually in an effort to extract extra-legal income for themselves and their benefactors. During the last several decades, these behaviors have become endemic in many African countries.¹⁰⁰ These growth-inhibiting

the United States, 10 BUS. & CONT. WORLD 171, 173 (1998); PERPETUATING POVERTY: THE WORLD BANK, THE IMF, AND THE DEVELOPING WORLD 1, 3–4, *passim* (Doug Bandow & Ian Vásquez eds., 1994); Peter Boone, *Politics and the Effectiveness of Aid*, 40 EUROPEAN ECON. REV. 289 (1996); MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 1, at 177–204. For example, during fiscal year 2009, sub-Saharan Africa received US\$44,704.2 million in net official development assistance while North Africa (Algeria, Egypt, Libya, Morocco, and Tunisia) received US\$2870.5 million. See THE WORLD BANK, AFRICAN DEVELOPMENT INDICATORS 2011, at 111 (2011).

99. For recent examinations of the rule of law in Africa, see Eric C. Christiansen, *Transformative Constitutionalism in South Africa: Creative Uses of Constitutional Court Authority to Advance Substantive Justice*, 13 J. GENDER, RACE & JUST. 575 (2010); David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARVARD INT'L L. J. 319, 369–77 (2010); PEACEBUILDING AND RULE OF LAW IN AFRICA: JUST PEACE? (C.L. Sri-ram, Olga Martin-Ortega & Johanna Herman eds., Routledge 2011); Robert Coniglio, *Note: Methods of Judicial Decision-Making and the Rule of Law: The Case of Apartheid South Africa*, 30 B.U. INT'L L.J. 497 (2012).

100. The Berlin-based Transparency International (“TI”) monitors perceptions of corruption around the world. According to TI’s Corruption Perceptions Index (CPI) for 2011, for example, most of the corrupt countries in the world are found in Africa. TRANSPARENCY INTERNATIONAL, CORRUPTIONS PERCEPTIONS INDEX 2011, at 4 (2011). See also MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 37–86 (examining the pervasiveness of corruption in the African economies); Charles M. Fombad, *Endemic Corruption in Cameroon: Insights on Consequences and Control*, in CORRUPTION AND DEVELOPMENT IN AFRICA: LESSONS FROM COUNTRY CASE STUDIES 234 (Kempe Ronald Hope, Sr. & Bornwell C. Chikulo eds., 2000) (examining the endemic nature of corruption on various African economies and its impact on growth and development).

behaviors have actually stunted the emergence of the type of productive—that is, private—sector capable of producing enough wealth to meet the needs of the people. In fact, corruption remains a very serious obstacle to entrepreneurship, especially among historically marginalized and deprived groups. The pervasiveness of corruption and other forms of political opportunism in the African countries is due to the fact that the laws and institutions that emerged in these countries in the post-independence period did not adequately constrain the state, allowing civil servants and political elites to act with impunity. Specifically, the constitutions of these countries did not guarantee the supremacy of law, nor did they provide mechanisms, such as the separation of powers, to realize those guarantees in practice. As a consequence, there were no viable and effective mechanisms available to citizens to adequately check the excesses of the government.¹⁰¹

101. MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 156–64. In the immediate post-independence period, military officers in some African countries argued that they could remedy what they believed was an untenable political and economic situation and significantly improve governance. Specifically, they argued that the military, built on a foundation and tradition of discipline, was the only institution capable of bringing warring ethnic and religious groups together and securing the peace, as well as ridding the public sector of opportunistic and recalcitrant civil servants and politicians, and establishing a professional, efficient, and fully functioning bureaucracy in each country. For example, the leaders of the military coup that brought Nigeria's First Republic to an end argued that they intervened to rid the country of dishonest, incompetent and corrupt civil servants and politicians, and "restore respectability to the Nigerian civil service." MBAKU, INSTITUTIONS AND REFORM IN AFRICA, *supra* note 1, at 123. In an address to the nation shortly after the January 15, 1966 coup that brought the military to power, Major Chukuma Kaduna Nzeogwu, the coup's leader, identified the following as the people who had destroyed the country and whose removal from office was critical for the maintenance of an efficient and viable bureaucracy: "political profiteers, swindlers, the men in the high and low places that seek bribes and demand ten percent, those that seek to keep the country divided permanently so that they can remain in office as ministers and V.I.P.'s of waste, the tribalists, the nepotists, those that make the country look big for nothing before international circles, those that have corrupted our society and put the Nigerian political calendar back by their words and deeds." Pita Ogaba Agbese, *With Fingers on the Trigger: The Military as Custodian of Democracy in Nigeria*, 9 J. THIRD WORLD STUD. 220, 227 (1992). Between 1966 and 1999, Nigeria was ruled primarily by military elites, virtually all of whom came into power through extra-constitutional means. Each group of military leaders that seized the apparatus of government repeated Maj. Nzeogwu's proc-

In the 1920s, John Dickinson studied administrative tribunals and common-law courts in the United States, and concluded that the law serves as an important mechanism for citizens to check the exercise of government agency.¹⁰² The ability of citizens to adequately check on the government is critical for the maintenance of the rule of law. As argued by British legal philosopher Albert Dicey,¹⁰³ the rule of law comprises “firstly, the supremacy of law as opposed to arbitrariness or even wide discretion by governments; second, the equality of all persons before the law; and third, in England, principles establishing the rights of individuals developed by case law through centuries in that country.”¹⁰⁴ Both Dicey and the many legal scholars and practitioners that came after him, especially in the Anglo-American spheres of influence, believed that in order for the rule of law to exist in a country, all citizens, including those who serve in government, must be subject to laws agreed upon in an earlier period. Under such a legal regime, the country’s citizens, whether they are members of the government or non-state actors, are subject to the country’s “known and standing” laws.¹⁰⁵ Thus, governance institutions under such a legal regime do not grant civil servants and political elites wide discretion to either make their own laws, or subvert existing ones, to generate extra-legal income for themselves. These elites, like other citizens, must respect existing laws and be subject to them.¹⁰⁶

lamation that poorly performing and opportunistic civilian rulers “make military coups inevitable through economic and political mismanagement.” *Id.* However, while in power, military officers did not perform any better than the civilian regimes that they had replaced. In addition to the fact that the military elites had come to power through extra-constitutional means, they considered themselves above the law. In virtually all African countries, military rule was pervaded by high levels of corruption, fraud, administrative ineptness, gross incompetence, and contempt for the rule of law; conditions that the military elites claimed they had seized power with the intention of eliminating. As stated by LeVine, intervention of soldiers in the politics of African countries epitomized “the low estate to which constitutionalism had fallen during the [period] 1963–89” in Africa. LeVine, *The Fall and Rise of Constitutionalism*, *supra* note 54, at 190.

102. JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 32 (Harvard University Press 1921).

103. Dicey, *supra* note 66.

104. *Id.* at 181.

105. *Id.*

106. *Id.*

According to Dickinson,¹⁰⁷ in a legal system characterized by the supremacy of law, “every citizen is entitled, first, to have his rights adjudicated in a regular common-law court, and secondly, to call into question in such a court the legality of any act done by an administrative tribunal.”¹⁰⁸ Throughout most of post-independence Africa, governments have operated with impunity, with those who are supposed to serve the public interest—the so-called state custodians—considering themselves above the law. In the words of Dicey, the existence of the rule of law in a country means “that no man is above the law, but that every man, whatever his rank or condition, is subject to the ordinary law of the realm, and amenable to the jurisdiction of the ordinary tribunals. . . . With us, every official, from Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.”¹⁰⁹

But, is not supremacy of law a concept that is uniquely a “central and most characteristic feature of . . . Anglo-American juristic habit”?¹¹⁰ In the mid-1980s and early-1990s, there were mass demonstrations throughout Africa. Led by grassroots organizations, these anti-government riots were designed to oust authoritarian regimes and bring about people-driven institutional reforms to enhance the deepening and institutionalization of democracy.¹¹¹ Implicit in these agitations for political transformation was the belief that the only way to bring about the peaceful coexistence of each country’s diverse population groups, as well as provide an enabling environment for the cre-

107. Dickinson, *supra* note 102, at 34–35.

108. *Id.* at 35.

109. *Id.* at 34.

110. *Id.* at 32–33.

111. See generally TRANSITION TO DEMOCRATIC GOVERNANCE, *supra* note 3 (outlining Africa’s transition-to-democracy movement of the mid-1980s and early 1990s). Of course, on December 17, 2010, a Tunisian street vendor set himself on fire in protest of his harassment by local government operatives. This act of self-immolation re-awakened the desire of citizens of several North African and Middle Eastern countries for democracy and the rule of law. This re-awakening produced mass demonstrations, some violent, that led to the ouster of many of the region’s long-serving authoritarian regimes and set the stage for institutional reforms to deepen and institutionalize democratic governance. Unfortunately, such people-driven, participatory, and bottom-up institutional reforms were never undertaken and the struggle to bring about the rule of law in these countries remains a work in progress.

ation of wealth, was to introduce into each country institutional arrangements that guarantee the supremacy of law.¹¹² If the law is supreme, implying that citizens, including those who serve in the government, do not consider themselves above the law, then citizens would be able to more effectively challenge and scrutinize the behaviors of those who govern them. Where citizens are able to question the actions of civil servants and politicians, the latter will find it quite difficult to engage in corruption and other growth-inhibiting behaviors like rent seeking, and as a result, public impunity would be minimized. Such a process can significantly enhance accountability.¹¹³

In a study of Cameroon, Nantang Jua was unable to find a single instance in which the government's anti-corruption programs had ever successfully brought a high-ranking civil servant or political elite to justice.¹¹⁴ He determined that:

[t]he Financial Disciplinary Committee of the Ministry of Public Service occasionally prosecutes low-ranking government officials such as postmasters, school bookkeepers and, from time to time, a few men of managerial rank. This can be seen as a device that, in a quest to enhance its legitimacy, the state uses to satisfy society's clarion call that sanctions be meted out on deviating bureaucrats. That higher-level bureaucrats are largely immune from trial by the Disciplinary Committee is evidence that Cameroon has an attenuated patrimonial administrative structure in which public discussion and/or criticism of the alleged acts of some members of the ruling class is still taboo.¹¹⁵

112. See generally TRANSITION TO DEMOCRATIC GOVERNANCE, *supra* note 3.

113. See generally MBAKU, CORRUPTION IN AFRICA, *supra* note 1.

114. Nantang Jua, *Cameroon: Jump-starting an Economic Crisis*, 21 AFR. INSIGHT 162 (1991).

115. *Id.* at 166. It is important to note, however, that some high-ranking officials were supposedly prosecuted and imprisoned for engagement in corrupt activities. These individuals were grouped into two main categories—"sacrificial lambs" and "fall guys." As determined by Mbaku, "sacrificial lambs" are members of the incumbent ruling coalition who are carefully selected and then run through a phony and opportunistic anti-corruption program in which the individual's 'conviction' is a forgone conclusion. Such conviction is followed by the imposition of ridiculously long prison sentences or exile. However, no genuine effort is made to recover the stolen public resources. This process usually satisfies the people's desire for sanctions against civil servants who have abused the public trust." Eventually, the disgraced civil servant is later "rehabilitated," brought back into the government

Despite the fact that since the 1990s Cameroon's political economy has changed significantly and the country now has a functioning multiparty "democratic" system of governance, the rule of law, specifically supremacy of law, remains elusive. In fact, "journalists who venture into investigations of the so-called 'untouchables' have found their newspapers seized by the government, their lives threatened, or worse—many of them have ended up in prison."¹¹⁶ For example, the late Pius Njawé, considered Cameroon's foremost independent journalist and publisher of *Le Messager*, was fined and imprisoned by the Biya regime for publishing, in his newspaper, an article seeking answers to the simple question: "Is President Biya Sick?"¹¹⁷

Cameroon, like many other countries in Africa, has not been able to provide itself with a legal system in which the law is supreme. As a result, most high-ranking civil servants and political elites in these countries consider themselves above the law and act with impunity. Citizens are unable to hold those who govern accountable, and corruption is pervasive, effectively constraining investment in productive activities, leading to the failure of Cameroon and the other African countries in the same situation to create the wealth that they need to confront poverty and deprivation, and to improve national living standards.

In the 1980s, Gould and Mukendi conducted a study of corruption in Zaire, and determined that wealthy and politically-connected individuals considered themselves above the law. Under the legal system existing in Zaire at the time, these highly-placed individuals, all of whom were politically well-connected to the regime of President Mobutu Sese Seko, considered themselves "untouchables" and hence, not subject to

and, in many cases, assigned positions of higher rank than the ones from which they had been sacked. "Fall guys' fall into two main categories: (1) top civil servants who have fallen out of favor with the incumbent ruling coalition and, unlike sacrificial lambs, are not considered loyal enough to be rehabilitated; and (2) low-level civil servants who are considered dispensable. When these individuals are 'judged' guilty of corruption, there is not much chance that the regime will rehabilitate them and return them to the public services." MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 97–98.

116. MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 97.

117. Lyombe Eko, *Hear All Evil, See All Evil, Rail Against All Evil: Le Messager and the Journalism of Resistance in Cameroon*, in THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA 123 (John Mukum Mbaku & Joseph Takougang eds., 2004).

the country's known and standing laws.¹¹⁸ Thus, it was rare to find a high-ranking civil servant or politician, or an individual of high wealth status in Zaire who was either subject to the law or who did not consider himself or herself above the law. Such well-placed individuals were regularly involved in corrupt deals, but were rarely prosecuted. Even if they appeared before a court of law, they were not likely to be convicted because, as determined by Gould and Mukendi, adjudication of court cases was not based on established legal rules and the facts presented in court, but on the wealth and political status of the individual.¹¹⁹

What Gould and Mukendi found in Zaire was not unique to that country. Throughout the continent, many civil servants and political elites continue to consider themselves above the law. Either because of the pervasiveness of corruption, or the fact that the judiciary in these countries is controlled by the executive, most of these high-ranking political operatives are rarely, if ever, brought to justice for their complicity in corruption and other forms of opportunism.¹²⁰ As a consequence, growth-inhibiting behaviors—in short, corruption, rent seeking, and financial malfeasance—are pervasive throughout many countries in the continent.¹²¹

118. David J. Gould & Tshiabukole B. Mukendi, *Bureaucratic Corruption in Africa: Causes, Consequences and Remedies*, 12 INT'L J. PUB. ADMIN. 427, 429 (1989).

119. *Id.* at 429–30.

120. See generally Fombad, *supra* note 100; MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 100; DAVID J. GOULD, BUREAUCRATIC CORRUPTION AND UNDERDEVELOPMENT IN THE THIRD WORLD: THE CASE OF ZAIRE (1980); CORRUPTION, CONSEQUENCES AND CONTROL (M. Clarke ed., 1983); CORRUPTION AND THE CRISIS OF INSTITUTIONAL REFORMS, *supra* note 1.

121. For example, during the time he was president of Nigeria (1993–1998), Sani Abacha stole US\$2–\$5 billion from the Nigerian economy. Mobutu Sese Seko, who was head of state in Zaire/Democratic Republic of Congo from 1965 to 1997, is reported to have stolen as much as US\$5 billion. Robin Rhodes, *Introduction*, in GLOBAL CORRUPTION REPORT 11 (Transparency International ed., 2004). On May 3, 2012, Salva Kiir, president of South Sudan, Africa's newest country and one of the continent's poorest, sent a letter to seventy-five high-ranking current and former government officials accusing them of stealing as much as US\$4 billion from the national treasury. David Smith, *South Sudan President Accuses Officials of Stealing \$4bn of Public Money*, GUARDIAN (June 5, 2012), <http://www.guardian.co.uk/world/2012/jun/05/south-sudan-president-accuses-officials-stealing>. Even without conducting an empirical study to determine

In the struggle to create the wealth that Africans need to address mass poverty and deprivation, it is very important that each African country undertake necessary reforms to provide institutional arrangements that guarantee the supremacy of law and force all citizens—including those who hold high-ranking positions in the government, as well as those who are financially well-to-do—to subject themselves to the law. Unless this is done, corruption and other growth-inhibiting behaviors will continue to frustrate these countries' ability to deal effectively with poverty.

C. Voluntary Acceptance of and Respect for the Law

The American Bar Association, which has taken a leadership role in the promotion of the rule of law in developing and transition countries, has stated that “[i]t is very difficult for a nation to maintain the rule of law if its citizens do not respect the law.”¹²² While citizens can be forced to obey the law through government coercion, usually with the help of the police and military forces, such a legal system is extremely costly and difficult to maintain or sustain.¹²³ However, if the majority of citizens voluntarily accept and respect the law, they are more like-

the impact of such theft of public resources on the economy, one can anecdotally see that there is severe damage to the country and its people, especially considering the fact that these are poor and highly deprived economies. Consider the fact that all four countries—Nigeria, Congo, DRC, and South Sudan—are considered by virtually all international development indicators as either having low human development levels or suffering from extreme poverty. The resources, which were diverted by politicians and civil servants to their personal use, could have been employed to provide basic services such as primary education, healthcare, nutrition for children, prenatal care for pregnant women, and clean water, especially for infants. *See generally* UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT, 2011.

122. A.B.A. Division of Public Education, *supra* note 73, at 5.

123. Nigeria is a good example of a country that has been unable to maintain an efficiently functioning and effective legal and judicial system. In fact, during the last several decades, the Nigerian legal system has been so ineffective that citizens have resorted to vigilantism as a way to protect themselves and their property, as criminals take over the streets and neighborhoods. *See generally* David Pratten, *Introduction: Perspectives on Vigilantism in Nigeria*, 78 AFR. J. INT'L AFR. INST. 1 (2008). *See also* DOMESTICATING VIGILANTISM IN AFRICA: SOUTH AFRICA, NIGERIA, BENIN, CÔTE D'IVOIRE, AND BURKINA FASO (Thomas G. Kirsch & Tilo Grätz eds., 2010); POLICING DEVELOPING DEMOCRACIES (Mercedes S. Hinton & Tim Newburn eds., 2009).

ly to comply, significantly minimizing the costs of compliance. As stated by the ABA, “[t]he rule of law functions because [the majority of citizens] agree that it is important to observe the law, *even if a police officer is not present to enforce it.*”¹²⁴

Of course, the main question for an African country struggling to institutionalize the rule of law is: how can the government create an atmosphere in which citizens will accept and respect the law? The answer lies in what the country’s laws are and how they are enacted. First, the laws enacted and adopted by the country must be those that citizens can obey, and obey willingly. As stated by U.S. suffragist and advocate of women’s rights, Elizabeth Cady Staton, “[t]o make laws that man cannot and will not obey, serves to bring all law into contempt. It is very important in a republic that the people should respect the laws, for if we throw them to the winds, what becomes of civil government?”¹²⁵ If, however, the laws that exist in a country are those that citizens cannot or are unwilling to comply with, the country’s counteracting agencies—typically, the police and the judiciary—face an uphill battle in trying to force compliance. Within such an institutional environment, maintaining law and order would either be extremely difficult or virtually impossible, especially for countries with limited resources to devote to law enforcement. Where the laws are extremely complex or difficult to understand, or are not relevant to the lives of the people and the problems they face, the people are less likely to respect and willingly obey them.¹²⁶

124. A.B.A. Division of Public Education, *supra* note 73, at 5 (emphasis added).

125. *Id.* (quoting Elizabeth Cady Stanton, Tenth National Women’s Rights Convention (May 10–11, 1860)).

126. Except for customs and traditions, laws in most African countries today are often adaptations of those left behind by the colonial government. In addition to the fact that the constitutions of all francophone countries in sub-Saharan Africa, except Guinea, are based on the Constitution of the French Fifth Republic (1958), many of the penal codes in these countries are actually based on those that were in existence during the colonial period. By accepting Charles de Gaulle’s offer of free association as autonomous republics within the *Communauté française* (French Community), the francophone sub-Saharan African countries effectively deprived their citizens of the opportunity to engage in robust constitutional discourse and produce laws and institutions that reflected their values, interests, aspirations, and customs. Such laws, had they been selected by each colony’s relevant stakeholders, would have been those that they were willing and able to obey, and which were relevant to their lives.

Second, citizens see the law as a tool that they can use to organize their private lives—for example, to start and run a business for profit, acquire and dispose of property, get married, engage in contracting, protect one's values from encroachment by either state or non-state actors, or otherwise engage in productive activities to create wealth. The law can also serve as an important instrument used by groups and communities, especially ethnic and religious groups, to protect their beliefs and practices from government interference. Most African countries have extremely diverse populations.¹²⁷ At independence, some groups—such as ethno-regional coalitions in West, East, and Central Africa, and religious groups in North Africa—captured control of the evacuated structures of colonial hegemony. Many minority ethnic and religious groups came to believe that public policy in their countries was controlled and dominated by the politically-dominant groups—that is, those that now controlled the apparatus of government—and that the minority groups were being systematically marginalized, deprived, and effectively pushed out to the economic and political periphery.¹²⁸

In a country where the rule of law functions effectively, ethnic and religious groups (or, for that matter, any group at all) that consider themselves marginalized or deprived do not have to resort to violent and destructive mobilization in order to improve their condition. They can, on the other hand, utilize the law to assert their rights. They can, for example, bring legal action against offending parties, whether these are state- or

127. Cameroon has more than 250 ethnic groups, South Africa, at least 10, and Nigeria, more than 250. See MBAKU, *CULTURE AND CUSTOMS OF CAMEROON*, *supra* note 22, at 5; FUNSO S. AFOLAYAN, *CULTURE AND CUSTOMS OF SOUTH AFRICA* (2004); TOYIN FALOLA, *CULTURE AND CUSTOMS OF NIGERIA* (2001).

128. This was the main argument given by the Ibo-dominated Biafrans when they sought to secede from the Federal Republic of Nigeria and form their own sovereign state. The Ibos argued that they had, since independence in 1960, been marginalized and discriminated against by the ethno-regional coalition (the Hausa-Fulani/Yoruba) that controlled the central government in what was then the capital city, Lagos. See, e.g., RALPH UWECHUE, *REFLECTIONS ON THE NIGERIAN CIVIL WAR: FACING THE FUTURE* (2004) (providing a rigorous examination of the Nigerian civil war, which came directly out of the struggle by Biafra for secession and independence); ALFRED OBIORA UZOKWE, *SURVIVING IN BIAFRA: THE STORY OF THE NIGERIAN CIVIL WAR* (2003) (providing an account of the war by a survivor of the conflict).

non-state actors, or present members of the group as candidates for election to important positions in the country's political system.

Citizens are more likely to accept and respect the law if representatives that they choose are the ones responsible for designing and adopting those laws. Making certain that the process through which the laws are made is participatory and inclusive achieves at least two critical objectives: first, that the resulting laws are locally-focused and therefore relevant to the lives of the people whose behaviors the laws are expected to regulate, reflecting their values; and second, that the laws are those that the people understand, respect, and are able and willing to obey. If the laws are externally imposed, they are not likely to reflect the people's values, nor would they be relevant to their lives.

Consequently, the third way to enhance the ability of Africans to accept and respect their laws is to make sure that the process through which laws are enacted in each country is open and transparent, and that citizens who so desire can participate fully; either directly, by participating in the political process, for instance by getting elected to a legislative position; or indirectly, by influencing the political system through voting, or using available public and private mechanisms to voice their opinions and try to shape public policy outcomes. Openness and transparency help the people know what the law is, understand the law, and make certain that the law reflects their values and is relevant to their lives, effectively enhancing compliance. Additionally, if the law-making process is open and transparent, citizens will be able to understand and appreciate the reason why a specific law has been enacted and why they must obey it.¹²⁹

The decolonization and immediate post-independence periods were supposed to offer Africans opportunities to engage in democratic constitution-making so that they could choose their own laws and institutions. Unfortunately, constitution-making in virtually all African countries at this time was top-down, elite-driven, and non-participatory, depriving citizens of each country of the opportunity to develop institutional arrangements capable of providing them with appropriate governance mechanisms. What these countries ended up adopting were

129. A.B.A. Division of Public Education, *supra* note 73, at 5.

laws and institutions that did not reflect local realities, the specificities of each country, or the values critical to the majority of each country's relevant stakeholders. Basically, the non-participatory and non-inclusive, and to a certain extent, secretive,¹³⁰ approach to constitution- and law-making in these countries produced institutional arrangements that the majority of citizens did not know or understand, and were therefore unwilling to accept or obey. In post-independence Cameroon and indeed, in many other African countries, citizens came to see national laws and institutions as part of an illegitimate legal regime designed to oppress and exploit them for the benefit of the ruling elites and their foreign benefactors.¹³¹

Finally, to make sure that citizens accept and respect the laws, the laws must be relevant to their lives and the problems that they face on a regular basis. Citizens must see the law as an instrument that they can use to deal effectively with everyday problems, including organizing their lives and peacefully resolving conflicts, including those that arise from trade and other forms of free exchange. If, however, citizens view the laws and institutions as "alien" impositions, used by the political elites to oppress and exploit them, they are more likely to refuse to recognize these laws, let alone obey them. Within such a context, compliance becomes very difficult—the police

130. For example, in the U.N. Trust Territory of Cameroons under French administration, the constitution for the independence of the territory was "compacted" by the Consultative Committee, created by Law No. 59-56 of October 31, 1959. In addition to the fact that the committee was not elected by Cameroonians, it carried out most of its work in Paris and the final text was a thinly disguised copy of the French Constitution of 1958. In fact, the *Union des populations du Cameroun* (UPC), the "country's largest and most important indigenous political party and one that represented a significant part of national political opinion, was denied participation in the constitution-making process." Excluding the UPC from participating in the constitution-making process effectively "eliminated a significant portion of national political opinion from constitutional discourse." MBAKU, INSTITUTIONS AND REFORM IN AFRICA, *supra* note 1, at 81.

131. See MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 64–74 (discussing the endemic nature of corruption and other forms of political opportunism in post-independence Africa and how this situation has been made possible by laws that failed to adequately constrain the state); LeVine, *supra* note 42, at 187–88 (examining the failure of West African countries to undertake democratic constitution-making to provide themselves with locally-focused laws and institutions—that is, laws and institutions that reflect the people's values and are relevant to their lives).

and other enforcement agencies may be totally overwhelmed and simply unable to perform their constitutionally assigned functions, effectively allowing society to degenerate into chaos and violence.¹³²

D. Judicial Independence

It is virtually impossible to maintain the rule of law in a country if its judiciary does not operate independently of the other branches of government. Judicial independence is a multifaceted concept that specifically requires that judicial officers be granted “security of tenure,” “financial security,” and “institutional independence.”¹³³ According to Judge Louraine C. Arkfeld, a one-time chair of the ABA Judicial Division Rule of Law and International Courts Committee, the following are the five critical principles of judicial independence:

- Decisional independence allows fair and impartial judges to decide cases pursuant to the rule of law and the governing constitutions unaffected by personal interest or threats or pressure from any source.
- Institutional independence recognizes the judiciary as a separate and co-equal branch of government charged with administering justice pursuant to the rule of law and as a constitutional partner with the executive and legislative branches authorized to manage its own internal operations without undue interference from the other branches.

132. During Ahidjo’s term as president of a unified Cameroon (1961–1982), he devoted a significant amount of the country’s limited resources to cultivating and sustaining extremely repressive and oppressive police agencies. These agencies, notably the BMM (*Brigade Mixte Mobile*) and Sedoc (*Service d’études et de la documentation*), were used effectively by Ahidjo to torture and force the people to conform to dysfunctional and anachronistic laws, all of which were designed to empower Ahidjo and his ethno-regional client network. Thus, while Ahidjo was able to maintain peace in Cameroon, this was not done through providing citizens with laws that they could voluntarily obey and which enhanced their ability to organize their private lives and live peacefully with their neighbors. Peaceful coexistence in Ahidjo’s Cameroon, like that during the colonial period, however, was achieved through the employment of extreme and brutal force by the state. See Abel Eyinga, *Governance by State of Emergency*, in GAULLIST AFRICA: CAMEROON UNDER AHMADOU AHIDJO 100 (Richard A. Joseph ed., 1978).

133. *Valente v. The Queen* [1985] 2 S.C.R. 673, paras. 27, 40, 47. This is the case by the Supreme Court of Canada that set the standard for judicial independence in Canada.

- Fair and impartial courts require competent judges who have been selected for their merit, who represent the diversity of their community, and who are provided with access to the law and continuing legal education provided by nonpolitical sources.
- An independent judiciary must have adequate resources including a budget that provides for adequate facilities and equipment, security, and just compensation for judges. In developing countries, the ability to provide security protections for judges is essential to their ability to decide without fear.
- There also must be a system of accountability for judges including a judicial code of ethics as well as a process for citizens to file complaints against judges for illegal or unethical conduct and an impartial disciplinary system that allows for a range of sanctions and removal of errant judges.¹³⁴

Judicial independence, as argued by the ABA, is built on a foundation in which judges are fair and impartial, there is separation of powers (the judiciary is a separate and co-equal branch of government), the selection of judges is based on merit and these judges represent the diversity of their communities, the judiciary and the judges who serve in them are granted enough resources and security, and judges are accountable to the U.S. Constitution.¹³⁵

In framing the U.S. Constitution, the founders of the American Republic made certain that judicial independence was provided for and guaranteed. As part of the effort to entrench judicial independence in the constitution, the framers made certain that all federal judges are guaranteed life tenure and their compensation is protected against diminution. According to Article III(2) of the U.S. Constitution:

The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for

134. Judge Louraine C. Arkfeld, *The Rule of Law and an Independent Judiciary*, 46 JUDGES J. 12–14 (2007).

135. *Id.*

their Services a Compensation, which shall not be diminished during their Continuance in Office.¹³⁶

As argued by Chief Judge Abner J. Mikva of the U.S. Court of Appeals for the District of Columbia, “[i]f the judges are given a role of reviewing the actions of the political branches as against a written constitution and its protective features, judicial independence must be built into the constitution itself.”¹³⁷ Judge Mikva then concludes by saying that a truly independent judiciary “must be protected from any institution or group capable of creating pressure. This means not only the ancient power of sovereigns to dismiss judges at their pleasure, but also the more subtle ability of officials to interfere with the administration of justice.”¹³⁸

Of course, the constitutions of virtually all African countries have some provision guaranteeing the independence of the judiciary.¹³⁹ For example, the Constitution of the Republic of South Africa (1996) states, at § 165, that:

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

136. U.S. CONST., art. III(2).

137. Judge Abner J. Mikva, *The Need for an Independent Judiciary: Implications for South African Reform*, 8 AM. U.J. INT’L L. & POL’Y 621 (1993).

138. *Id.* at 622–23.

139. African constitutions that expressly provide for judicial independence include Ghana (Articles 125 & 127); Namibia (Article 78); Uganda (Articles 126 & 128); Zambia (Article 91); and Egypt (Articles 165 & 166). For a discussion of judicial independence in Africa, see H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1304–7 (2006).

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.¹⁴⁰

The independence of the judiciary has been recognized by South Africa's Constitutional Court in several cases, holding that "judicial independence . . . is foundational to and indispensable for the discharge of the judicial function in a constitutional democracy based on the rule of law."¹⁴¹ In its ruling, the Constitutional Court endorsed the view expressed by the Supreme Court of Canada in *R v. Valente*¹⁴² that the minimum requirements for judicial independence are "security of tenure,"¹⁴³ "financial security"¹⁴⁴ free from "arbitrary interference by the Executive in a manner that could affect judicial independence,"¹⁴⁵ and "institutional independence with respect to matters of administration bearing directly on the exercise of the judicial function . . . [and] judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function."¹⁴⁶

In addition, South Africa's Constitutional Court has also held that:

[t]he Constitution thus not only recognizes that courts are independent and impartial, but also provides important institutional protection for the courts. The provisions of section 165, forming part of the Constitution that is the supreme law, apply to all courts and judicial officers, including magistrates' courts and magistrates. These provisions bind the judiciary and the government and are enforceable by the superior courts, including this Court.¹⁴⁷

Through its various rulings, the Constitutional Court of South Africa has made clear that judicial independence has two important dimensions: individual independence, providing that when adjudicating cases, judicial officers must be independent and impartial; and institutional independence, meaning specific structures and guarantees must be provided so that judicial

140. S. AFR. CONST., 1996.

141. *De Lange v. Smuts* (1998)[3]SA 785[CC], para. 59.

142. *Valente v. The Queen* [1985] 2 S.C.R. 673.

143. *Id.* para. 27.

144. *Id.* para. 40.

145. *Id.*

146. *Id.* paras. 47, 52.

147. *Van Rooyen v. The State* (2002)[5]SA 24[CC], para. 18.

officers and the courts are adequately protected against interference from external actors. Such external actors include the other branches of government, notably the executive, who are likely to come before the judiciary.¹⁴⁸

Cameroon is one country that has failed to guarantee judicial independence. The country's constitution guarantees judicial independence—"[j]udicial power shall be exercised by the Supreme Court, Courts of Appeal and Tribunals,"¹⁴⁹ and "[t]he Judicial Power shall be independent of executive and legislative powers."¹⁵⁰ Nevertheless, the constitution also declares that "[t]he President of the Republic shall guarantee the independence of judicial power. He shall appoint members of the bench and for the legal department."¹⁵¹ By assigning one branch of government the power to guarantee the independence of another, the framers of Cameroon's Constitution could not have been thinking of true judicial independence and separation of powers. According to C. M. Fombad, "[a] careful analysis of the constitutional provisions,"¹⁵² "show[s] that the 1996 amendment did not add anything substantive to the pre-existing practice which would lend any credence to the existence of a separate and independent judiciary in Cameroon."¹⁵³

According to Fombad,¹⁵⁴ all of Cameroon's post-independence chief executives—the country has had only two heads-of-state since reunification in 1961—have enjoyed absolute power and control over the judiciary branch through the control of the ap-

148. This can be seen in the Constitutional Court's decisions in *De Lange v. Smuts* and *Van Rooyen v. The State*. See also AMY GORDON & DAVID BRUCE, *THE TRANSFORMATION AND THE INDEPENDENCE OF THE JUDICIARY IN SOUTH AFRICA* (2006).

149. CONSTITUTION OF THE REPUBLIC OF CAMEROON, art. 37(2).

150. *Id.* art. 37(3).

151. *Id.*

152. Cameroon's 1996 Constitution was an amended version of the 1972 Constitution. Part of the objectives of those who developed the amendments was supposedly to improve the constitution's formal restraint mechanisms and prevent arbitrary exercise of government agency. The amendments formally introduced the concept of the separation of powers, judicial independence, and freedom of expression. See CONSTITUTION OF THE REPUBLIC OF CAMEROON, arts. 37(2), (3). However, as already discussed, these efforts have not been effective in fostering the separation of powers, in particular, and the rule of law, in general, in Cameroon.

153. Fombad, *supra* note 100, at 247. See also Fombad, *Judicial Power in Cameroon's Amended Constitution*, *supra* note 14.

154. Fombad, *supra* note 100, at 247–48.

pointment and promotion of judiciary officers, and budgetary allocations to the judiciary. In addition, Fombad determined that shortly before the elections of 1996 and 1997, President Paul Biya issued a decree doubling the salaries of judicial officers, and raised, by almost 200%, the compensation rates for justices of the supreme court who have the authority to certify the results of each election, including the presidential election.¹⁵⁵

Since reunification and the formation of what is now the Republic of Cameroon, the country's constitution has not provided for the effective separation of powers. As a consequence, the universally accepted elements of the rule of law do not actually exist under the terms of Cameroon's 1996 Constitution—the guarantee of security of tenure, financial security, and institutional independence of the judiciary have all been left to the vagaries of the political process, and specifically to the discretion of the president of the Republic, another branch of government. This, of course, is in line with the imperial presidency that was created by the adoption of the Gaullist model of government in the former U.N. Trust Territory of Cameroons under French administration, when it gained independence on January 1, 1960.¹⁵⁶ That model of government remained in effect when the Republic of Cameroon united with the former U.N. Trust Territory of Southern Cameroons under British administration, on October 1, 1961, to form what is now present Cameroon.¹⁵⁷

155. *Id.*

156. See generally LEVINE, *supra* note 42 (detailing constitution-making in the U.N. Trust Territory of Cameroons under French administration). The Trust Territory gained independence on January 1, 1960, and took the name *République du Cameroun*.

157. *Id.*; MBAKU, INSTITUTIONS AND REFORM IN AFRICA, *supra* note 1 (detailing, inter alia, the struggles of Africans to provide themselves with institutional arrangements that adequately constrain the state); John Mukum Mbaku, *Cameroon's Stalled Transition to Democratic Governance: Lessons for Africa's Democrats*, 1 AFR. ASIAN STUD. 125, 125–26 (2002). Note that the polity that emerged from the unification of the former U.N. Trust Territory of Southern Cameroons under British administration and the then République du Cameroun was a federation called the Federal Republic of Cameroon (République Fédérale du Cameroun) with Ahmadou Ahidjo as president. A new constitution was adopted in 1972 and effectively abrogated the federation, turning the latter into a unitary state. In 1984, Paul Biya, who had succeeded Ahidjo as president in 1982, changed the name of the country to Republic of Cameroon (République du Cameroun), the name that the country has re-

E. Openness and Transparency

In the effort to improve conditions for wealth creation and human development in Africa, three aspects of openness and transparency are important. First, it is important that the process through which the constitution is compacted is transparent and open so that the participation of each of the country's relevant stakeholders is maximized. Second, post-constitution law-making must be open and transparent, so that even those who do not actively participate in the political process are aware of how laws are made and why certain laws are selected. Finally, the design and implementation of public policies is a critical element in the fight against behaviors such as rent seeking and corruption, which have been found to be major constraints to wealth creation and economic growth in Africa.¹⁵⁸ Making certain that the government conducts the people's business openly and in a transparent manner¹⁵⁹ signifi-

tained to the present moment. *See generally* MBAKU, CULTURE AND CUSTOMS OF CAMEROON, *supra* note 22.

158. For a study of corruption and other forms of opportunism in Africa, see MBAKU, CORRUPTION IN AFRICA, *supra* note 1. As argued by Gerring and Thacker, "[o]penness and transparency, which we may understand as the availability and accessibility of relevant information about the functioning of the polity, is commonly associated with the absence of corruption. Since corruption, by definition, violates generally accepted standards of behavior, greater transparency should discourage corrupt actions, or at least facilitate appropriate mechanisms of punishment (legal, administrative or electoral)." John Gerring & Strom C. Thacker, *Political Institutions and Corruption: The Role of Unitarism and Parliamentarism*, 34 BRIT. J. POL. SCI. 295, 316 (2004).

159. This includes making sure that information about government activities is presented to the people, and done so in a relatively accessible form and manner. Note that while putting information on government websites may at first appear to be an effective way to maintain transparency in government operations, this method may not be adequate in a country where most citizens do not have access to the Internet. Hence, adoption of a given technology to enhance transparency should be context-specific—that is, the ability of the people to use the technology should be considered before adoption. Also to be considered is the language or languages in which the information would be provided to the people. In Africa, most countries have adopted European languages (French in former French and Belgian colonies; English in former British colonies, etc.) as so-called "official languages," and these are used widely in government and commerce. Unfortunately, most of the citizens in these countries are not fluent in these foreign languages. Consequently, for purposes of making certain that citizens have access to government operations, the government should provide information in languages that are accessible to the people.

cantly reduces corruption and other forms of political opportunism. Most important, especially for African countries, is the fact that openness and transparency in the design and implementation of public policies significantly enhance participation, and hence, improve the chance that policies that reflect the values, interests, and aspirations of all of the country's relevant stakeholder groups will result. Where openness and transparency are maintained, groups such as ethnic and religious minorities that believe that given policies do not adequately reflect their values and interests are not likely to resort to violent and destructive mobilization, especially if as a result of the government's open approach to policy, these groups either had the opportunity to participate fully and effectively in the design process, or were aware of how the laws were made and why.

In studies of good governance, the concepts of "openness" and "transparency" are considered to be closely linked, but are not synonymous.¹⁶⁰ Openness and transparency, as they relate to the government, can be understood as "the availability and accessibility of relevant information about the functioning of the polity."¹⁶¹ According to Lord Nolan, "transparency is said to require that 'holders of public office should be as open as possible about all decisions and actions they take.'"¹⁶² Regardless of how transparency is defined or conceived, most scholars and practitioners generally agree that "transparent decisions must be clear, integrated into a broader context, logical and rational, accessible, truthful and accurate, open (involve stakeholders), and accountable."¹⁶³ Additionally, "[a] transparent decision record should provide enough information to allow an interested person to 'verify claims made' or otherwise reconstruct both the process and rationale for the decision."¹⁶⁴

In general, transparency enhances the ability of an individual who is interested in a public policy, or thinks or believes a

160. See, e.g., Gerring and Thacker, *supra* note 158, at 316.

161. *Id.*

162. Deirdre Curtin & Albert Jacob Meijer, *Does Transparency Strengthen Legitimacy?*, 11 INFO. POLITY 109 (2006) (quoting FIRST REPORT OF THE COMMITTEE ON STANDARDS IN PUBLIC LIFE, Cm 2850, HMSO (1995)).

163. Christina H. Drew & Timothy L. Nyerges, *Transparency of Environmental Decision Making: A Case Study of Soil Cleanup Inside the Hanford 100 Area*, 7 J. RISK RES. 33, 36 (2004).

164. *Id.* at 36 (citing LAURIE GARRETT, BETRAYAL OF TRUST: THE COLLAPSE OF GLOBAL PUBLIC HEALTH (2000)).

decision might affect them, to understand and appreciate how that decision was made or arrived at and why.¹⁶⁵ Transparency, then, is very important where governments make decisions that affect the lives of citizens, for example, public policies on health and safety.¹⁶⁶ In fact, in Africa, where a significant number of countries have governments that are not representative of their diverse populations,¹⁶⁷ making certain that public decisions are made through transparent processes can significantly minimize the distrust that many ethnic and religious groups have for their governments, especially those that have been historically marginalized and pushed to the economic and political periphery. Thus, if a minority ethnic or religious group argues that government policies are significantly influenced by, and essentially benefit the ethno-regional groups that dominate and control the government, an open and transparent approach to the design and implementation of public policies would, at a minimum, (1) provide opportunities for these heretofore marginalized groups and communities to participate; and (2) also allow them to witness and understand how decisions affecting their lives are made.¹⁶⁸ This is especially critical for African countries, most of which have extremely diverse

165. Drew & Nyerges, *supra* note 163, at 33.

166. This includes, especially, policies on environmental health. For example, decisions made by government agencies, such as the U.S. Environmental Protection Agency ("EPA") that regulates industrial pollution, can have significant impacts on the health of citizens. Hence, those decisions must be made in an open and transparent manner. *See, e.g.*, CRAIG E. COLTEN & PETER N. SKINNER, *THE ROAD TO LOVE CANAL: MANAGING INDUSTRIAL WASTE BEFORE EPA* (1996) (exploring the tragedy of Love Canal before the formation of the EPA and how openness and transparency may have averted the disaster or at the very least, minimized its impact on the town and its environs).

167. For example, in Cameroon, the Anglophones have persistently complained of political and economic marginalization at the hands of the Francophones who have dominated the government since reunification in 1961. In fact, since 1961, the presidency of the Republic has been monopolized by Francophones, and some ministries, especially defense and territorial administration, have never been headed by an Anglophone. *See generally* Piet Konings & Francis B. Nyamnjoh, *President Paul Biya and the "Anglophone Problem" in Cameroon*, in *THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA* 191 (John Mukum Mbaku & Joseph Takougang eds., 2004) (examining Anglophone marginalization); Piet Konings & Francis B. Nyamnjoh, *The Anglophone Problem in Cameroon*, 35 J. MOD. AFR. STUD. 107, 207–08 (1997).

168. Drew & Nyerges, *supra* note 163, at 33.

populations and have encountered significant ethnic-induced violence during the last several decades.¹⁶⁹ Much of this violence has been perpetuated by groups that believe the public policies were designed in secret, and were aimed at marginalizing these groups.¹⁷⁰

Since independence, many African countries have had governments that have not been representative of their diverse populations. In such polities, openness and transparency, especially in the design and implementation of public policies, can minimize the distrust that some ethnic and religious groups have for their governments. Some parts of the population of the country¹⁷¹ often believe that national policies are designed to benefit members of the ethno-regional groups that dominate

169. Among African countries with diverse populations that during the last several decades have encountered ethnic-induced violence are Sudan, Nigeria, Sierra Leone, Liberia, Kenya, Côte d'Ivoire, Rwanda, and Democratic Republic of Congo. Some of these conflicts have resulted in brutal civil wars. *See generally* JULIUS MUTWOL, *PEACE AGREEMENTS AND CIVIL WARS IN AFRICA: INSURGENT MOTIVATIONS, STATE RESPONSES, AND THIRD-PARTY PEACEMAKING IN LIBERIA, RWANDA, AND SIERRA LEONE* (2009); GEORGE KLAY KIEH, JR., *THE FIRST LIBERIAN CIVIL WAR: THE CRISIS OF UNDERDEVELOPMENT* (2008); UWECHUE, *supra* note 128; MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* (2001); D.H. JOHNSON, *THE ROOT CAUSES OF SUDAN'S CIVIL WARS* (2003); HEALING THE WOUND: *PERSONAL NARRATIVES ABOUT THE 2007 POST-ELECTION VIOLENCE IN KENYA* (Kimani Njogu ed., 2009); THOMAS TURNER, *THE CONGO WARS: CONFLICT, MYTH & REALITY* (2007).

170. Such groups include the indigenous ethnic groups in Liberia, which argued that the government of the country had been dominated and controlled by the Americo-Liberians since 1847. The Americo-Liberian hegemony, the indigenous groups argued, had developed public policies, usually without the participation of members of indigenous ethnic groups, which had effectively impoverished the indigenous peoples and pushed them to the economic and political periphery. This was one of the reasons advanced by Master Sergeant Samuel Kanyon Doe, a member of the Krahn ethnic group, when he overthrew the government of William R. Tolbert, an Americo-Liberian. Doe subsequently executed Tolbert and members of his cabinet and assumed the presidency of Liberia. Shortly after the coup, "[t]he majority of Liberians welcomed the coup." MUTWOL, *supra* note 169, at 51. Such perceived marginalization at the hands of a central government that was dominated by people from other groups was the motivation behind the attempt by the Igbos to secede from the rest of Nigeria, and with other minority groups, form the Republic of Biafra. *See generally* ALEXANDER A. MADIEBO, *THE NIGERIAN REVOLUTION AND THE BIAFRAN WAR* (1980).

171. For example, the Anglophones of Cameroon. *See* Konings & Nyamnjoh, *supra* note 167.

and control the government exclusively.¹⁷² Transparency and openness in the design and implementation of public policies will provide opportunities for minority groups to participate in, as well as enhance their ability to understand how government decisions affecting their lives are made.¹⁷³

Today, corruption is one of the most important constraints to wealth creation and economic growth in Africa.¹⁷⁴ While there

172. For example, the groups that engineered the civil wars that brutalized the citizens of Liberia, Rwanda, and Sierra Leone, gave as reason for their actions the marginalization of their own groups at the hands of a central government dominated by other groups. For example, in overthrowing the government of Liberia on April 12, 1980, Master Sergeant Samuel Kanyon Doe sought to bring to an end the Americo-Liberian hegemony that had exploited and marginalized the country's indigenous groups since 1847, including Doe's Krahn ethnic group. In fact, shortly after Doe executed the overthrow of the government of William R. Tolbert, "[t]he majority of Liberians welcomed the coup; the indigenous people especially rejoiced that they had finally attained the power and full rights that had been denied to them for far too long." MUTWOL, *supra* note 169, at 51.

173. See, e.g., Drew & Nyerges, *supra* note 163. Note that although Doe, as well as the leaders of the events that led to civil wars in Liberia and Sierra Leone, and the Rwanda genocide, may have used supposed or perceived marginalization of the groups to which they belonged as the reason for their actions, as history has since proved, these individuals were opportunists seeking ways to capture the government so that they could use its structures to enrich themselves. Their intentions, as proven by the actions that they took once they had control of the apparatus of government, were not to right any perceived or actual wrongs and make governance and resource allocation more efficient and equitable. In the case of Liberia, for example, this is evidenced by the level of brutality visited on the various population groups in the country, as well as the wanton destruction of private property and the country's social overhead capital—schools, roads, power lines, and other infrastructure—by the Doe regime. See, e.g., KIEH, JR., *supra* note 169 (presenting an alternative to the dominant view that the Liberian civil war was caused by historical conflicts between the country's various ethnic groups; instead, he argues that the war was a result of the failure by those who established the Liberian state in 1847 and successive governments to provide the state with institutional arrangements that would have enhanced the ability of all groups to live together peacefully and maximize their values).

174. See generally Fombad, *supra* note 100 (presenting studies of corruption and how the latter affects the economies of several African countries). Note that corruption is not only an obstacle to economic growth, but it is also a constraint to human development. For example, in their efforts to enrich themselves through corrupt practices, civil servants in many African countries often allocate public goods and services arbitrarily and capriciously, favoring those citizens that are willing and able to bribe them. As a consequence, the poor, virtually all of whom do not have the resources to supply

are many ways to clean up corruption and minimize its impact on wealth creation, the most important are openness and transparency, especially in government operations. As argued by Gerring and Thacker,¹⁷⁵ "[s]ince corruption, by definition, violates generally accepted standards of behavior, greater transparency should discourage corrupt actions, or at least facilitate appropriate mechanisms of punishment (legal, administrative or electoral)."¹⁷⁶ Generally, even in countries where corruption is endemic, the public usually does not condone corrupt behavior, especially within the bureaucracy. In fact, the productive sector—that is, the private sector, which is responsible for creating wealth—sees bureaucratic corruption as a serious obstacle to the profitability of its enterprises. Ordinary citizens, on the other hand, consider the corrupt behaviors of civil servants and political elites as a form of interference with their ability to organize their lives and improve their welfare.¹⁷⁷ Some scholars have argued that "[c]orruption often results from a lack of accountability and participation."¹⁷⁸ Hence, legal and institutional schemes that enhance citizen participation and force more accountability of the governing to the governed, and by implication, to the constitution, can help significantly in the fight against corruption.¹⁷⁹

Public sectors in many African economies are notorious for having extremely high levels of corruption.¹⁸⁰ In the provision

the bribes requested, are denied access to welfare-enhancing services. MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 109–10.

175. Gerring & Thacker, *supra* note 158.

176. *Id.* at 316.

177. For example, corruption can make it virtually impossible for citizens, especially the poor and historically marginalized groups, such as women, to have access to welfare-enhancing public services like prenatal care; clean drinking water; education, especially at the primary level; basic health care; and police protection. *See generally* MBAKU, CORRUPTION IN AFRICA, *supra* note 1.

178. Joachim Ahrens & Patrick M. Rudolph, *The Importance of Governance in Risk Reduction and Disaster Management*, 14 J. CONTINGENCIES CRISIS MGMT. 207, 216 (2006).

179. *See id.*

180. Studies that have determined corruption to be endemic in the public sectors of African economies include MBAKU, CORRUPTION IN AFRICA, *supra* note 1; Hope & Chikulo, *supra* note 100; CORRUPTION: CAUSES, CONSEQUENCES AND CONTROL (Michael Clarke ed., 1983); DAVID J. GOULD, BUREAUCRATIC CORRUPTION AND UNDERDEVELOPMENT IN THE THIRD WORLD:

of public services for example, civil servants in many African countries are known to act arbitrarily and capriciously, favoring those individuals who pay them bribes.¹⁸¹ In these economies, openness and transparency can serve two important, separate but related purposes. As argued by Stirton and Lodge, “[t]he first is to ensure that public service providers respect both the positive and negative rights of individuals.”¹⁸² They argue further that “[t]his instrumental justification for transparency of public services comes close to Bentham’s principle for good governance: ‘The more strictly we are watched, the better we behave.’”¹⁸³ The second purpose, argue Stirton and Lodge, “relates more directly to democratic theory, which values participation by individuals in the decisions that affect them.”¹⁸⁴ Young¹⁸⁵ argues that

[p]articipatory approaches to democratic theory hold that democracy is a hollow set of institutions if they only allow citizens to vote on representatives to far away political institutions and protect those citizens from government abuse. A fuller democracy in principle means that people can act as citizens in all the major institutions which require their energy and obedience.

Stirton and Lodge argue further that “[t]ransparency, on this view has moral value because it enhances individual autonomy by involving citizens directly in the process of making decisions which affect their lives and interests” and “enhances individual autonomy to the extent that transparent institutions are pre-

THE CASE OF ZAIRE xii–xiii (1980); CORRUPTION AND THE CRISIS OF INSTITUTIONAL REFORMS, *supra* note 1.

181. See, e.g., MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 102–05.

182. Lindsay Stirton & Martin Lodge, *Transparency Mechanisms: Building Publicness into Public Services*, 28 J.L. & SOC’Y 471, 476 (2001).

183. *Id.*

184. Stirton & Lodge, *supra* note 182, at 476. Economists have long known and argued that participation in the design of policies by people at the local level is critical because those people have more information about demand and supply conditions at the local or community level than the elites at the center of the government. See, e.g., INSTITUTIONS AND REFORM IN AFRICA, *supra* note 1, at 203–07 (arguing, inter alia, that effective policy design requires access to time-and-place information that is more available to individuals at the local level than those at the center).

185. Iris Marion Young, *Political Theory: An Overview*, in A NEW HANDBOOK OF POLITICAL SCIENCE 479, 485 (R. E. Goodin & Hans-Dieter Klingemann eds., 1996).

dictable, allowing individuals to order their own private choices knowing the way that these are affected by public decisions.”¹⁸⁶

In the view of Koppell, “[t]ransparency is the literal value of accountability, the idea that an accountable bureaucrat and organization must explain or account for his actions.”¹⁸⁷ Additionally, “[t]ransparency is most important as an instrument for assessing organizational performance, a key requirement for all other dimensions of accountability.”¹⁸⁸ Citizens, including those of the African countries, place a high value on transparency and openness in the operation of their governments—citizens are interested in knowing how public policies are designed and implemented, especially those which have a direct impact on their lives.¹⁸⁹ Considering the negative impact that corruption has on the lives of many people, and considering also the fact that transparency tends to minimize engagement in corrupt behaviors, it is no wonder that citizens are interested in transparency.

Transparency is also a critical element of a trustworthy governmental regime. As argued by Fairbanks, Plowman, and Rawlins, where government communicators undertake their operations in a transparent and open manner, such an approach is likely to garner significant support for the government.¹⁹⁰ Specifically, the benefits of transparent communication practices by the government include “increased public support, increased understanding by the public of agency actions, increased trust, increased compliance with agency rules and regulations, an increased ability for the agency to accomplish its [sic] purpose and a stronger democracy.”¹⁹¹ In order for

186. Stirton & Lodge, *supra* note 182, at 476.

187. Jonathan G.S. Koppell, *Pathologies of Accountability: ICANN and the Challenge of “Multiple Accountabilities Disorder,”* 65 PUB. ADMIN. REV. 94, 96 (2005).

188. *Id.*

189. TI, the Berlin-based non-governmental organization that studies global corruption and provides tools for countries to use in fighting corruption, has branches in most countries, including those in Africa. In the African countries, TI’s branch offices monitor openness and transparency in government and try to help governments deal with openness and accountability issues. See generally TRANSPARENCY INTERNATIONAL, GLOBAL CORRUPTION REPORT 2012 (2012).

190. Jenille Fairbanks, Kenneth D. Plowman & Brad L. Rawlins, *Transparency in Government Communication*, 7 J. PUB. AFF. 23, 33 (2007).

191. *Id.* at 33.

government communicators to achieve transparency, they “must adopt practices that promote open information sharing. These include working to enhance agency relationships with the publics they serve through responding to public needs, seeking and incorporating feedback and getting information out to the public through a variety of channels.”¹⁹²

From their study of transparency, Fairbanks, Plowman, and Rawlins also conclude that “[t]ransparency in the decision making process, quells the fear that decisions in government agencies have been made as a result of undue political or industry influence because the process is open to the public.”¹⁹³ They also determined that transparency in government operations produces “a feeling of trust in [one’s] government and the ability to realize a comfort in understanding that [one is] being treated equally with others and that the government is working in [one’s] best interest.”¹⁹⁴ For Africa, this is an important and critical point—effective management of ethnic and religious diversity requires that all groups within the country feel that they are being treated equally and that the process of designing and implementing public policies is not being used to marginalize them. Of course, one way to restore a feeling of trust among a country’s diverse population groups in their government is to make certain that public operations are as transparent as possible.

One of the most important outcomes of the top-down, elite-driven, non-participatory approach to constitution-making is that many of today’s governance systems in the African countries do not offer citizens the wherewithal to hold their civil servants and political leaders accountable. In these countries, those who serve in government are neither accountable to civil society, nor to the constitution.¹⁹⁵ As the struggle to improve governance in the continent continues, it is important for Africans to recognize that an effective way to enhance accountability is to mandate transparency in the performance of public-sector activities. First, transparency can force civil servants and political elites to be accountable to the citizens that they

192. *Id.*

193. *Id.* at 28.

194. *Id.* at 28–29.

195. Julius O. Ihonvbere, *Constitutions Without Constitutionalism? Towards a New Doctrine of Democratization in Africa*, in *TRANSITION TO DEMOCRATIC GOVERNANCE*, *supra* note 3, at 137–51.

serve, and second, transparency “can also act as an incentive for people to participate in collective action and it facilitates the spread of innovation and technical change.”¹⁹⁶

An African country interested in improving governance and minimizing public-sector opportunism by implementing transparency in, say, government communications, should consider the following. First, in all its activities or operations, the government must adopt a policy that values “open, honest and timely” communication with citizens and must avoid the manipulation of information, a process that has become part of the survival strategy of many authoritarian regimes in the continent.¹⁹⁷ Second, all individuals who communicate on behalf of the government—civil servants, political elites, and other agents of the government—should adopt “practices that promote open information sharing.”¹⁹⁸ Third, the government, while taking into consideration issues of privacy, should work closely with bureau managers to “create an organizational structure that supports transparency.”¹⁹⁹ And fourth, all government communicators should be provided with enough access to time, staff, and monetary resources.²⁰⁰ One must note, however, that although openness and transparency are desirable qualities in a democratic government, care must be taken so that the private rights of citizens are not violated. While it is critical that the law provides public communicators with the tools to enhance openness and transparency, the law should also constrain these communicators in order to make certain that they or their activities do not violate the privacy rights of citizens.

Since the emergence of the Internet as a viable mode of communication, the “e-government” model has been recommended as an effective way, even for money-strapped developing countries, to improve transparency.²⁰¹ According to Pina, Torres and Royo:

196. Ahrens & Rudolph, *supra* note 178, at 216.

197. Fairbanks, Plowman & Rawlins, *supra* note 190, at 33.

198. *Id.*

199. *Id.* at 34.

200. *Id.* at 32.

201. See Vicente Pina, Lourdes Torres & Sonia Royo, *Are ICTs Improving Transparency and Accountability in the EU Regional and Local Government? An Empirical Study*, 85 PUB. ADMIN. 449, 450 (2007).

[t]he interactivity of the Internet is expected to make governments more responsive to the needs and demands of citizens. More information delivered in a more timely fashion to citizens is expected to increase the transparency of government and to empower citizens to monitor government performance more closely. E-government is therefore viewed as a positive channel for enhancing trust in governments through government accountability and by empowering citizens.²⁰²

The e-government model has the potential to significantly improve transparency and openness, and hence, accountability in the governments of developed countries such as the United States and those of the EU. However, one must note that in many African countries, where the Internet is still in its embryonic stages, and only a few privileged groups and individuals are able to access it, this potential for transparency has yet to be exploited.²⁰³ An important way for the government to improve transparency is to make certain that all its agencies and departments develop websites and publish information about their operations on these websites so that citizens can easily access this data. In order for this to materialize in Africa, however, each African government must first provide the appropriate infrastructure for enhancing the ability of each citizen to have full and effective access to the Internet. Additionally, governments should accelerate their efforts to improve access to education, especially at the primary level, so that the population—notably members of historically disadvantaged groups, including women and girls, rural inhabitants, and minority ethnic groups—can accumulate the human capital needed to enhance their ability to benefit from the new information technology. As part of the process to improve access to education, the government should make sure that facilities are provided in the rural areas, as well as to adult learners, so that they can

202. *Id.* (citing C.C. Demchak, C. Friis & T.M. LaPorte, *Webbing Governance: National Differences in Constructing the Public Face*, in HANDBOOK OF PUBLIC INFORMATION SYSTEMS 179–96 (G.D. Garson ed., 2000)).

203. According to INTERNET WORLD STATS, USAGE AND POPULATION STATISTICS FOR AFRICA, the percentage of Internet users in Africa in 2012 was 7%, compared to 93% for the rest of the world. Within the continent, the country with the highest percentage of Internet users was Nigeria, at 28.9%, followed by Egypt (17.8%), and Tunisia (7.2%). INTERNET WORLD STATS, INTERNET USAGE STATISTICS FOR AFRICA, <http://www.internetworldstats.com/stats1.htm> (last visited Mar. 16, 2013).

participate fully and effectively in the new knowledge-based economy. Of course, given the fact that most people in the African countries are not literate in their country's national language,²⁰⁴ it may be necessary for the government to provide information to citizens in their own languages. Thus, a decentralized form of information provision, which empowers local or sub-national governments to develop and maintain the public websites on which information about government operations can be placed, may be advisable.

In the struggle against those factors that constrain wealth creation in Africa, such as corruption and rent seeking, openness and transparency can serve as important tools. In addition to the fact that openness and transparency significantly increase and improve accountability, and hence, minimize corruption and rent seeking, transparency and openness also enhance the participation of citizens in governance; a process that enhances the ability of the government to effectively fight corruption.

F. Predictability

As the ABA²⁰⁵ and several legal scholars and philosophers²⁰⁶ have argued, a very important element of the rule of law is that the law must not be administered arbitrarily and capriciously. It is important that citizens be able to "expect predictable results from the legal system."²⁰⁷ By "predictable results," the ABA means that "people who act in the same way can expect the law to treat them in the same way."²⁰⁸

In countries in which the common law is the foundation for the legal system, "courts contribute to the rule of law through their authority to make common law rules and to interpret legislation and constitutions; those actions shape the legal environment in which citizens order their economic and personal

204. For example, English in former British colonies and French in the former colonies of France and Belgium.

205. A.B.A. Division of Public Education, *supra* note 73, at 5.

206. Stein, *supra* note 70, 298; Lord Bingham, *supra* note 67.

207. A.B.A. Division of Public Education, *supra* note 73, at 5.

208. *Id.*; Chemerinsky, *supra* note 75, at 6-8. Note Chemerinsky's formulation: "The government must treat likes alike and unalikes unlike."

affairs.”²⁰⁹ When courts make law, unlike legislatures and administrative tribunals, they are “not subject to democratic processes that ensure citizens’ participation in the creation of new rules or the alteration of existing ones.”²¹⁰ Courts employ the informal norm of stare decisis to promote and advance critical elements of the rule of law, such as stability and predictability.²¹¹ If a country’s legal system follows the norm of stare decisis, then that country’s courts will not reject legal authority established by the ruling of an earlier court if the facts presented in the extant case—the case currently waiting to be decided—are analogous to those of the case whose decision produced the legal authority.²¹² By maintaining fidelity to precedent and the informal stare decisis norm, courts significantly enhance the stability and predictability of the law.

U.S. courts have recognized the critical role played by adherence to precedent, contributing to legal stability in the United States. In a U.S. Supreme Court decision, *John R. Sand & Gravel Company v. U.S.*,²¹³ the Court held that

even if the Government cannot show detrimental reliance on our earlier cases, our reexamination of well-settled precedent could nevertheless prove harmful. Justice Brandeis once observed that ‘in most matters it is more important that the applicable rule of law be settled than that it be settled right.’ To overturn a decision settling one such matter simply because we might believe that decision is [no] longer ‘right’ would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability.²¹⁴

In certain circumstances, however, it might be necessary to forego adherence to precedent for public policy reasons—that is, if the courts determine that doing so would further important societal objectives. What is important to note here is that while adherence or fidelity to precedent is important for achieving legal stability, the latter must not be achieved or se-

209. Stefanie A. Lindquist & Wendy L. Martinek, *Legal Stability and Economic Growth*, Paper presented at the State Politics and Policy Conference, June 2–4, 2011, Dartmouth College, Hanover, NH (on file with author).

210. *Id.*

211. *Id.*

212. *Id.*

213. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008).

214. *Id.* at 139.

cured at the expense of making the law so rigid and unbending that it becomes "impervious to changing societal norms and practices."²¹⁵ Judges, then, should be granted the discretion to occasionally decline to follow precedent in order to meet certain well-defined societal needs or objectives. Of course, if judges do opt to ignore or not follow precedent, and as a consequence create new law, they must appreciate the fact that the new law they create will invariably produce a new set of constraints, separate from those that had been created by the previous and now overruled law, by which citizens must now abide. Additionally, judges must recognize that frequent changes in the law, through judges' failure to follow precedent, can create an unstable legal regime, severely constraining the ability of citizens to use the law to organize or order their private lives.

Stare decisis is an effective, although informal, norm that can be used by judges to improve and enhance stability of the legal system. Nevertheless, judges can and do overrule existing precedent in an effort to make certain that the law continues to evolve and maintain its relevance to citizens' lives and values. If, however, judges "frequently change the status quo by overruling precedent, it produces an unstable legal environment that creates greater difficulty for citizens to predict the legal consequences of their actions or transactions in the future."²¹⁶

Judges must balance maintaining legal stability, a desirable goal in any society, with the need to make sure that the law does not remain stagnant and is dynamic enough to meet evolving societal needs. Because legal stability is an important element of the rule of law, it is critical in Africa's fight against corruption and other growth-inhibiting behaviors. As argued by Judge Diane P. Wood of the U.S. Court of Appeals for the Seventh Circuit, "the laws must not be arbitrary."²¹⁷

G. The Protection of Human Rights

Constitution-making and the practice of constitutionalism in the United States have, historically, been based on the belief by the Founding Fathers and subsequent leaders and social reformers that the Constitution and the laws derived from such a

215. Linquist & Martinek, *supra* note 209, at 7.

216. *Id.*

217. Judge Diane P. Wood, *Centennial Tribune Essay: The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, 457 (2003).

document would guarantee and protect citizens' fundamental rights.²¹⁸ In a similar fashion, many of the Africans²¹⁹ who fought for or supported and sustained the decolonization project believed that the post-independence dispensation would be built on a foundation of respect for human and fundamental rights. Specifically, many Africans believed that the immediate- or post-independence government would engage each country's diverse population groups in democratic constitution-making to produce and adopt institutional arrangements capable of constraining the state, protecting human rights, enhancing peaceful coexistence, and promoting entrepreneurship and the creation of wealth, especially among historically marginalized and deprived groups and communities, such as women, rural inhabitants, minority ethnic groups, and the urban poor.²²⁰

218. See, e.g., A.B.A. Division of Public Education, *supra* note 73, at 5.

219. In its struggle against apartheid in South Africa, for example, the African National Congress ("ANC") insisted that its struggle was strictly against "white supremacy" and not against white people. The ANC argued that it was seeking to establish a government in South Africa that would respect and guarantee the rights of all peoples—black, brown, and white. For example, the manifesto of the ANC's armed wing, Umkhonto we Sizwe, issued on December 16, 1961, justifies armed struggle as follows: "In these actions, we are working in the best interests of all the people of this country—black, brown and white—whose future happiness and well-being cannot be attained without the overthrow of the Nationalist government, the abolition of white supremacy and the winning of liberty and full national rights and equality for all the people of this country." AFRICAN NATIONAL CONGRESS, MANIFESTO OF UMKHONTO WE SIZWE (16 Dec. 1961), *available at* <http://www.anc.org.za/show.php?id=77>. In addition, at his trial in 1964, Nelson Mandela, then a high-ranking official of the ANC, the organization that was fighting to overthrow the apartheid government of South Africa, made the following statement: "During my lifetime I have dedicated myself to this struggle of the African people. I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities . . . It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die." Nelson Mandela, Statement from the Dock at the Opening of the Defense Case in the Rivonia Trial, Pretoria Supreme Court, South Africa, 20 Apr., 1964, *available at* <http://rfksafilm.org/html/speeches/mandela.php>.

220. See generally John Mukum Mbaku, *Constitutionalism and the Transition to Democratic Governance in Africa*, in TRANSITION TO DEMOCRATIC GOVERNANCE, *supra* note 3, at 103–36.

Throughout the post-independence period in Africa, the indigenous elites who captured the evacuated structures of colonial hegemony did not undertake the type of constitution-making and institutional reforms that would have produced legal and judicial systems capable of ensuring the rule of law and guaranteeing the protection of human rights. On the contrary, most of the continent's post-independence political elites engaged in top-down, elite-driven, opaque, and non-participatory approaches to constitution-making, resulting in laws and institutions that were not capable of protecting the fundamental rights of citizens.²²¹ In addition, post-independence law-making was also top-down, non-participatory, and monopolized by elites at the center, many of whom lacked the legitimacy to rule and legislate because they did not secure their positions through popular and free elections.

It is generally believed, at least in the West, that the modern movement to protect human rights began with the signing of the Magna Carta in 1215 by King John of England, recognizing the rights of some of his subjects. According to Chapter 39 of the Magna Carta:

No free man shall be seized or imprisoned, or stripped of his rights and possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force

221. For example, Ahmadou Ahidjo, the first president of the Republic of Cameroon, argued during the decolonization period that it was not necessary for the territory to engage in democratic constitution-making and that such an undertaking should be left for the post-independence period. Achieving independence, he argued, was more important than engaging the population in rules selection. However, like other former French colonies, the Ahidjo-led government accepted Charles de Gaulle's offer of "association" as autonomous polities within the French Community and based the country's constitution on the Constitution of the French Fifth Republic (1958). The country's first constitution—Constitution of the Republic of Cameroon 1960—was intended to be temporary, yet remains the foundation of Cameroon's present constitution. See generally LEVINE, *supra* note 42; Levine, *The Fall and Rise of Constitutionalism*, *supra* note 54. Thus, after more than fifty years of existence as an autonomous political unit, the Cameroon state has not yet engaged its citizens in democratic constitution-making to reconstruct and reconstitute the dysfunctional state structure inherited from French and British colonialists.

against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.²²²

As argued by the ABA, the Magna Carta “planted the seed for the concept of *due process* as it developed first in England, and then in the United States. Due process means that everyone is entitled to a fair and impartial hearing to determine their legal rights.”²²³ Countries whose legal systems are based on the Anglo-American legal and cultural tradition look to the Magna Carta as an important source of many elements of their legal systems, especially those dealing with individual rights. Many of the countries that came into being after World War II, however, consider the U.N. General Assembly’s adoption, in 1948, of the Universal Declaration of Human Rights, as the foundation for the modern movement to protect human rights.²²⁴ Since 1948, the U.N. has adopted several other conventions and covenants, all designed to enhance the protection of human rights.²²⁵

222. THE MAGNA CARTA, *available at* <http://www.fordham.edu/halsall/source/magnacarta.asp> (last visited Aug. 2, 2012).

223. A.B.A. Division of Public Education, *supra* note 73, at 4 (emphasis in original).

224. According to the United Nations, the Universal Declaration of Human Rights (“UDHR”) is the foundation of international human rights law. The “Universal Declaration,” the U.N. continues, “serves as a model for numerous international treaties and declarations and is incorporated into the constitutions and laws of many countries.” United Nations, A United Nations Priority: Universal Declaration of Human Rights, <http://www.un.org/rights/HRToday/declar.htm> (last visited Apr. 24, 2013). In addition, the U.N. states that the adoption of the UDHR in 1948 “marked the first time that the rights and freedoms of individuals were set forth in such detail. It also represented the first international recognition that human rights and fundamental freedoms are applicable to every person, everywhere.” *Id.* Romuald R. Haule argues that “[a]lthough human rights had their origin in natural law, it took a system of positive law to provide a definite and systematic statement of the actual rights which people possessed.” Romuald R. Haule, *Some Reflections on the Foundation of Human Rights—Are Human Rights an Alternative to Moral Value?*, 10 MAX PLANCK Y.B. UN L. 367, 380 (2006). He states further that the “Universal Declaration became the Magna Carta of humankind.” *Id.* at 390.

225. Some of them include the International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Convention on the Prevention and Punishment of the Crime of Genocide (1948); Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949); International Con-

Most African countries have signed and ratified these covenants and conventions.²²⁶ In addition, many of these countries have inserted, within their constitutions, clauses that supposedly guarantee the protection of human rights.²²⁷ Unfortunately, throughout the continent, these rights are regularly violated by both state- and non-state actors. Part of the reason why these rights are not being protected is that African countries have failed to provide themselves with the tools to do so—it is very difficult for the fundamental rights of citizens to be protected in a country whose legal system does not guarantee the rule of law. For example, if law is not supreme and those who serve in government consider themselves to be above the law, they are more likely to act with impunity and engage in activi-

vention on the Elimination of Racial Discrimination (1966); International Convention on the Suppression and Punishment of the Crime of *Apartheid* (1973); Convention on the Elimination of All Forms of Discrimination Against Women (1979). See P.R. GHANDHI, BLACKSTONE'S INTERNATIONAL HUMAN RIGHTS DOCUMENTS (4th ed. 2004).

226. For example, the International Covenant on Civil and Political Rights, which opened for signature on December 19, 1966, has either been granted accession or ratification by many African countries. UNITED NATIONS, UNITED NATIONS TREATY COLLECTION: INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

227. For example, Chapter Five of the Constitution of the Republic of Ghana is headed "Fundamental Human Rights and Freedoms" and contains the following:

(1) The fundamental human rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies and, where applicable to them, by all natural and legal persons in Ghana, and shall be enforceable by the Courts as provided for in this Constitution.

(2) Every person in Ghana, whatever his race, place of origin, political opinion, color, religion, creed or gender shall be entitled to the fundamental human rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest.

In addition, Chapter Eighteen of the Constitution of the Republic of Ghana establishes a *Commission on Human Rights and Administrative Justice*, which is charged with making certain that the rights guaranteed by the constitution are protected. See Constitution of the Republic of Ghana (1992), ch. 18.

ties that violate the rights of citizens.²²⁸ Civil servants in many African countries engage in opportunistic approaches to the allocation of public services, and in the process, deprive many citizens, especially the poor, from having access to welfare-enhancing and in many instances, life-saving services, such as police protection, clean water, basic health care, prenatal care, shelter, and nutrition, especially for children.²²⁹

As part of the effort to improve national legal and judicial systems in order to provide an enabling environment for the creation of wealth, each African country must make certain that the new institutional arrangements guarantee citizens' fundamental rights. Each African country must make certain that its "legal processes are sufficiently robust and accessible to ensure enforcement of [all] protections [of human and fundamental rights] by an independent legal profession."²³⁰

On May 25, 2011, the Organization for Economic Cooperation and Development ("OECD") released its Guidelines for Multinational Enterprises ("OECD Guidelines") as part of the effort to improve global governance and enhance the ability of multinational companies to operate in the global economy. The OECD Guidelines make specific reference to human rights and the Universal Declaration of Human Rights. Specifically, the Guidelines expressly demand that OECD-based multinational companies "[r]espect the internationally recognised human rights of those affected by their activities consistent with the host government's international obligations and commitments."²³¹ However, despite the fact that during the last several decades, multilateral agencies such as the OECD, have provided several legal instruments to fight corruption and protect human rights, it must be reiterated that fighting corruption and protecting human rights in Africa is the responsibility of each African government. Thus, each country must provide an institutional environment that enhances the eradication of cor-

228. See, e.g., HUMAN RIGHTS UNDER AFRICAN CONSTITUTIONS: REALIZING THE PROMISE FOR OURSELVES (Abdullahi Ahmed An-Na'im ed., 2003) (examining the struggle to protect human rights in Africa in general, and in specific African countries in particular—Ethiopia, Ghana, Guinea, Morocco, Mozambique, Nigeria, Rwanda, South Africa, Sudan, and Uganda).

229. See, e.g., MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 110.

230. Stein, *supra* note 70, at 302.

231. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (OECD, 2011), § II(2).

ruption and the protection of human rights. Such an enabling environment is built on a foundation of the rule of law.

IV. FURTHER INSIGHTS INTO THE RULE OF LAW AS A CATALYST FOR DEVELOPMENT IN AFRICA

A. Introduction

Many studies have been devoted to uncovering the reasons for Africa's underdevelopment and inability to achieve high levels of human development.²³² These studies have placed the constraints on economic performance and the failure to significantly improve living conditions for Africans into two categories—external and internal.²³³ Identified as external constraints to Africa's failure to develop are (1) natural disasters;²³⁴ (2) the international financial system;²³⁵ and (3) the economic policies of the Western developed countries such as the United States, European Union, and other members of the OECD.²³⁶

Internal constraints to development include (4) corruption; (5) highly ineffective economic infrastructures; (6) low domestic savings rates; (7) trade dependence;²³⁷ (8) high population growth rates; (9) political instability;²³⁸ (10) military interven-

232. See generally ACCELERATED DEVELOPMENT IN SUB-SAHARAN AFRICA, *supra* note 1; WORLD BANK, SUB-SAHARAN AFRICA: FROM CRISIS TO SUSTAINABLE GROWTH, A LONG-TERM PERSPECTIVE STUDY (1989); Z. Ergas, *In Search of Development: Some Directions for Further Investigation*, 24 J. MOD. AFR. STUD. 303 (1986); MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 1, at 21–42.

233. John Mukum Mbaku, *Constitutional Discourse and the Development of Structures for Sustainable Development in Africa*, 22 J. STUD. ECON. ECONOMETRICS 1 (1998).

234. Natural disasters include droughts, floods, and locusts.

235. Many Africans believe that the international financial system discriminates against exporters from the continent and makes it very difficult for the continent to participate gainfully in the global economy.

236. Mbaku, *supra* note 233, at 4.

237. Most African countries carry out the bulk of their export and import trade with their former colonizers and little or no trade with their neighbors.

238. Here, political instability includes that caused by violent mobilization by ethnic and religious groups, which believe they are or have been marginalized by a central government dominated and controlled by other groups. Some of this ethnic-induced political instability includes civil wars in Liberia, Sierra Leone, Rwanda, Democratic Republic of Congo, Somalia, and Ethiopia. See generally MADIEBO, *supra* note 170 (providing an eye-witness account of

tion in politics; and (11) external debts that these countries have not been able to service and repay.²³⁹ By the late 1970s, some scholars had begun to include, as a cause of underdevelopment in the continent, “policy mistakes made by well-meaning but poorly educated and incompetent officials.”²⁴⁰ The scholars called for greater emphasis to be placed on recruiting and bringing into the public sector individuals who were “better trained, honest, more disciplined and skilled,”²⁴¹ in order to provide a more enabling environment for economic growth and development. Many of these scholars believed that the main problem in Africa was the absence of effective public policies capable of enhancing investment in the productive sectors and advancing the creation of wealth.²⁴² The suggestion was that more honest and competent individuals should be placed in the bureaucracies.²⁴³

In many of these immediate post-independence debates about economic development in Africa, little or no emphasis was placed on institutions and their impact on entrepreneurship and wealth creation. However, along with the interest in the transition to democratic governance that began in the continent shortly after the collapse of the Soviet Union and the demise of socialism in Eastern Europe, many scholars began to study the impact of institutions on macroeconomic perfor-

the Nigerian civil war); Uwechue, *supra* note 128 (providing an examination of the causes and consequences of the civil war that lasted from 1967 to 1970); MARK HUBAND, *THE LIBERIAN CIVIL WAR* (1998) (providing an account of the Liberian civil war); KIEH, JR., *supra* note 169 (detailing the causes of the Liberian civil war); MAHMOOD MAMDANI, *WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA* (2001) (examining the events that led to the genocide in Rwanda); GEBRU TAREKE, *THE ETHIOPIAN REVOLUTION: WAR ON THE HORN OF AFRICA* (2009) (providing a history of Ethiopia with specific emphasis on its civil wars); D.H. JOHNSON, *THE ROOT CAUSES OF SUDAN’S CIVIL WARS* (2003) (exploring the economic, social, political, and religious causes of Sudan’s various civil wars). *See also* HEALING THE WOUND: PERSONAL NARRATIVES ABOUT THE 2007 POST-ELECTION VIOLENCE IN KENYA (Kimani Njogu ed., 2009) (presenting a series of narratives by individuals who were either directly involved in or affected by the ethnic-induced post-election violence in Kenya in 2007).

239. Mbaku, *supra* note 233, at 5; MBAKU, *INSTITUTIONS AND DEVELOPMENT*, *supra* note 1, at 71–114; Ergas, *supra* note 232, at 304.

240. Mbaku, *supra* note 233, at 5.

241. *Id.*

242. *Id.*

243. *Id.*

mance.²⁴⁴ This new literature on African development argued that "[t]he inability or unwillingness of entrepreneurs in the African countries to engage in wealth-creating activities can be linked to poorly developed, non-viable, and weak institutions that were adopted at independence."²⁴⁵ In addition to the fact that the institutional arrangements adopted by African countries at independence were incapable of providing the wherewithal for the effective management of ethnic and religious diversity, they did not foster and promote entrepreneurial activities or promote wealth creation. Additionally, they failed to adequately constrain civil servants and politicians, and as a result, these economies were pervaded by corruption, financial malfeasance, rent seeking, and other forms of political opportunism.²⁴⁶

Although part of Africa's underdevelopment was attributed to the absence of effective leadership, later studies determined that while competent leadership is necessary, it is not a sufficient condition for sustainable economic growth and development.²⁴⁷ Each country must be provided with laws and institutions that "provide the appropriate incentive system for market participants"²⁴⁸ to engage in wealth creation and economic growth. These institutions are those that guarantee the rule of law.

244. See generally MBAKU, INSTITUTIONS AND REFORM IN AFRICA, *supra* note 1 (showing how the lack of effective institutions has contributed significantly to poor economic performance in the African countries); MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 1 (discussing the failure of development theory and the rise of public choice theory as a more effective mechanism to explain African underdevelopment). See also TRANSITION TO DEMOCRATIC GOVERNANCE, *supra* note 3 (discussing transition to democratic governance as a way to improve not only peaceful coexistence, but also wealth creation, and hopefully, economic development).

245. Mbaku, *supra* note 233, at 5.

246. See generally John Mukum Mbaku, *Bureaucratic Corruption and the Crisis of Institutional Reforms in Africa*, 8 BUS. & CONT. WORLD 145 (1996); John Mukum Mbaku, *Bureaucratic Corruption in Africa: The Futility of Cleanups*, 16 CATO J. 99 (1996).

247. MBAKU, INSTITUTIONS AND REFORM IN AFRICA, *supra* note 1; J.D. Gwartney & R.E. Wagner, *Public Choice and the Conduct of Representative Government*, in PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 3 (J.D. Gwartney & R.E. Wagner eds., 1988).

248. Mbaku, *supra* note 233, at 5.

B. The Rule of Law as a Catalyst for Development in Africa

By far, one of the most important constraints to wealth creation and economic growth in Africa is corruption.²⁴⁹ Part of the reason why corruption is virtually endemic in many African countries today is the fact that the institutional arrangements in these countries have failed to guarantee the supremacy of law.²⁵⁰ Where the law is supreme, civil servants and political elites are effectively and adequately constrained, and are prevented from engaging in corruption and other growth-inhibiting behaviors. In Africa today, many of the continent's political leaders, including civil servants, consider themselves above the law and regularly engage in various forms of opportunism to "enrich themselves at the expense of those they are supposed to serve."²⁵¹ In a study of corruption in Cameroon, Jua²⁵² determined that "public discussion and/or criticism of the alleged acts of some members of the ruling class is still taboo."²⁵³ In August 2012, just a little over a year since South Sudan became an independent country, it was already "engulfed in scandals over top officials allegedly looting the treasury."²⁵⁴ This is due, of course, to the failure of the new nation to provide its various peoples with institutional arrangements that adequately and effectively constrain civil servants and pol-

249. MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 4.

250. Note that although some African constitutions purport to guarantee the supremacy of law, the practice is that some individuals, especially those who hold high-ranking positions in government, still consider themselves above the law. For example, Cameroon's 1996 Constitution limited the president to two consecutive terms of seven years in office. Yet, in 2008, Paul Biya, who had already served two terms of seven years each in office as president, basically ignored the law and used his position in the party to have the constitution changed so that he could contest the presidency again. Thus, despite the fact that he had agreed in 1996 to the two-term limit, he was still willing to subvert the existing laws to maximize his interests.

251. MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 118–19.

252. Jua, *supra* note 114.

253. *Id.* at 166. Although this study was completed in 1991, the situation has not changed significantly. Fombad's 2004 study found similar acts of impunity by civil servants and politicians. Charles Manga Fombad, *The Dynamics of Record-breaking Endemic Corruption and Political Opportunism in Cameroon*, in THE LEADERSHIP CHALLENGE IN AFRICA: CAMEROON UNDER PAUL BIYA 357 (John Mukum Mbaku & Joseph Takougang eds., 2004).

254. John Burnett, *At Age One, A Tattered Reputation for South Sudan*, at <http://www.npr.org/2012/08/02/157791705/at-age-one-a-tattered-reputation-for-south-sudan> (last visited Aug. 3, 2012).

iticians—in other words, laws and institutions that guarantee the rule of law, and hence, force all citizens, including those who serve in the government, to remain subservient to the law. Unless this is done, corruption, rent seeking, and other forms of opportunism will remain pervasive, as civil servants and politicians continue to act with impunity, and entrepreneurs will find it extremely difficult to engage in those activities that create wealth.

Colonialism, as has been argued by many scholars,²⁵⁵ was not a mutually beneficial arrangement between Africans and the Europeans. Instead, it was a cruel, opportunistic, repressive, violent, and highly exploitative system designed to capture benefits for the metropolitan economies and the Europeans resident in the colonies.²⁵⁶ As a consequence, the laws and institutions that the Europeans established in each colony to help them manage the local populations and enhance their ability to appropriate African resources were not democratic, but were instead designed to keep the Europeans—the governors of the colonies—above the law.²⁵⁷ In fact, the Europeans who colonized Africa made no effort to either utilize already existing indigenous institutions—which in the past had proven quite effective and efficient in the peaceful resolution of conflict and the promotion of domestic production systems—or engage the African populations in either deepening existing institutions, or designing more effective systems of governance.²⁵⁸ Rather, Af-

255. See, e.g., Fatton, Jr., *supra* note 27, at 457.

256. See *id.* at 457–58.

257. In the French colonies, for example, the policy of assimilation, and later, association, created two legal systems, one for “indigenes” and another for French citizens and those few Africans who had been assimilated to the French cultural ideal. Under this system, French citizens in the colonies functioned essentially above the law. See generally JOHN D. HARGREAVES, *WEST AFRICA: THE FORMER FRENCH STATES* (1967); JOHN D. HARGREAVES, *FRANCE AND WEST AFRICA: AN ANTHOLOGY OF HISTORICAL DOCUMENTS* (1969); VIRGINIA THOMPSON & RICHARD ADLOFF, *FRENCH WEST AFRICA* (Greenwood, 1969). For a description of the dual legal system in the U.N. Trust Territory of Cameroons under French administration, see VICTOR T. LEVINE, *THE CAMEROONS: FROM MANDATE TO INDEPENDENCE* (Hoover Institution, 1964); Levine, *The Fall and Rise of Constitutionalism*, *supra* note 54.

258. In a series of articles published in the *Africa Peace and Conflict Journal*, several authors argue that “indigenous cultural practices and traditional structures of leadership” can play a very significant role in enhancing peaceful coexistence and effective governance in Africa. Tim Murithi, *Guest Editor's Note*, 2 *AFR. PEACE CONFLICT J.* 1 (2009). Martha Mutisi examines

frican traditional institutions were destroyed to make way for the introduction and sustaining of laws and institutions that enhanced European seizure, forceful possession, and exploitation of colonial resources for the benefit of the metropolitan economies.²⁵⁹

At independence, many African countries failed to engage their populations in democratic constitution-making to secure more effective institutional arrangements to replace those left by the colonialists. For example, in the francophone countries, except for Guinea, national constitutions were based on the French Constitution of 1958, and not on robust national constitutional discourses. In addition to the fact that these top-down, elite-driven, and non-participatory approaches to constitution-making forced these countries to adopt institutional arrangements that did not reflect the people's values and aspirations, they also failed to adequately constrain the state. Perhaps more importantly, throughout Africa, citizens came to see these constitutions, and the laws that were enacted under them, as foreign impositions designed to maximize the interests of the new leaders and their foreign benefactors. Few Africans came to accept and respect their post-independence laws and institutions. Even as late as the 1990s, francophone countries in Africa were still using the Constitution of the French Fifth Republic as the model for "constructing" their laws and institutions. For example, in a study of the post-Cold War democratization process in Mauritania, Ould-Mey determined that "[t]he July

Rwanda's gacaca as an instrument for addressing legal issues associated with or arising out of the country's genocide and concludes that the gacaca can play a significant role in restorative justice; Susan Kilonzo, Sussy Kurgat & Simon Omare take a look at "taboos" and how they can be used to effectively deal with natural resource management and conservation issues in Kenya. They conclude that taboos can serve just as well as formal legal mechanisms in helping minimize overexploitation and degradation of the environment. Martha Mutisi, *Gacaca Courts in Rwanda: An Endogenous Approach to Post-conflict Justice and Reconciliation*, 2 AFR. PEACE CONFLICT J. 17 (2009); S.M. Kilonzo, S.G. Kurgat & S.G. Omare, *The Role of Taboos in the Management of Natural Resources and Peace-building: A Case Study of the Kakamega Forest in Western Kenya*, 2 AFR. PEACE CONFLICT J. 39 (2009).

259. See, e.g., Julius O. Ihonvbere & John Mukum Mbaku, *Introduction: Establishing Generalities and Specificities in Africa's Struggle for Democracy and Development*, in POLITICAL LIBERALIZATION AND DEMOCRATIZATION IN AFRICA: LESSONS FROM COUNTRY EXPERIENCES, *supra* note 3, at 2–3.

1991 Constitution [of Mauritania] was essentially based on the Constitution of the French Fifth Republic of October 1958.”²⁶⁰

Yet, voluntary acceptance of and respect for a country's laws significantly lower the costs of maintaining compliance.²⁶¹ Because many Africans view their present legal and judicial institutions as alien impositions designed for the benefit of the ruling elites—and not for helping the people govern themselves, organize their private lives, and deal with daily problems and conflicts—they have rejected these laws and the civil servants and governmental agencies that enforce them. African countries can only resolve this problem, of the failure of the majority of citizens to accept, respect, and trust the law, by engaging in the type of institutional reconstruction that allows each country to replace the legal and judiciary systems inherited from the Europeans with structures that are more locally-focused and reflect the values, interests, aspirations, and customs and traditions of each country's relevant stakeholder groups. This can only be achieved by engaging the people in democratic constitution-making—given the opportunity, then, the people will choose laws that they can respect, accept, and obey, and which would enhance their ability to live together peacefully and engage in those activities that maximize their values, including creating the wealth that they need to meet their obligations.

260. Mohameden Ould-Mey, *Structural Adjustment Programs and Democratization in Africa*, in MULTIPARTY DEMOCRACY AND POLITICAL CHANGE: CONSTRAINTS TO DEMOCRATIZATION IN AFRICA 35, 49 (John Mukum Mbaku & Julius O. Ihonvbere eds., 1998).

261. In a recent paper on compliance with the law, Levi, Tyler, and Sacks argue that “[g]overnments are most dependent upon the cooperation of their citizens under those circumstances in which they are least able to obtaining it via the mechanisms [of surveillance and sanctioning] or reward and punishment.” They argue further that although it is possible for a governmental regime to rule the country using only coercive force, ruling with “legitimate power makes governing easier and more effective.” Where citizens consider government legitimate, they are more likely to voluntarily accept and respect the government's laws and regulations. Where government is considered by the citizens to be illegitimate, officials have to “expend more resources in monitoring and enforcement to induce sacrifice and compliance.” Thus, the “existence of legitimacy reduces the transaction costs of governing by reducing reliance on coercion and monitoring.” Margaret Levi, Tom Tyler & Audrey Sacks, Draft, *The Reasons for Compliance with Law*, Paper for the Workshop on the Rule of Law, Yale University, Mar. 28–29, 2008, <http://www.yale.edu/macmillan/ruleoflaw/papers/ReasonsforCompliance.pdf>.

The creation of wealth requires that a country possess a legal and judicial system that can provide the wherewithal for the resolution of conflicts arising from trade and other forms of mutually beneficial exchange.²⁶² In order for the judicial system to function effectively in this capacity, it must be made a co-equal partner in governance with the other branches of government—typically, the executive and legislative—meaning, there must be judicial independence. If the judiciary becomes subservient to the executive, it is likely to be used by the latter to maximize its interests and those of its supporters. In response, groups within the country that consider themselves marginalized may resort to violent mobilization, a process that can exacerbate political and economic instability, and make it difficult for the country to attract the investment needed for economic growth and development.

As much as judicial independence is a critical factor in creating the appropriate institutional environment for wealth creation in Africa, many countries in the continent continue to have problems when it comes to the actual practice of this concept. While many constitutions in the continent actually “honor conventional separation-of-powers principles by organizing the

262. As an example, consider conflicts arising from the failure of one party to a contract to live up to or abide by the terms of the contract. Although many conflicts associated with private contracts are often resolved by the parties themselves, without the involvement of the judiciary system, many contract disputes end up in court. Individuals or businesses intending to invest in an economy usually consider the legal mechanisms for resolving conflicts arising from contract disputes as critical to their decision to commit funds to the economy in question. Studies by economists have shown that a country's legal structure and protection of property rights are very important for wealth creation. See JAMES GWARTNEY & ROBERT LAWSON, *ECONOMIC FREEDOM OF THE WORLD: 2004 ANNUAL REPORT* 35–37 (The Fraser Institute, 2004). In addition, the ability of a country to attract and retain the skilled labor resources—in other words, human capital—needed for productive entrepreneurial activities is dependent on, inter alia, the quality of its legal system. In fact, the poor quality of legal systems in many African countries is a major contributing factor to “brain drain,” the migration of highly-skilled manpower from the African countries to the industrialized economies of the West and the failure of these economies to attract highly-skilled manpower from the developed economies. See generally ARNO TANNER, *EMIGRATION, BRAIN DRAIN AND DEVELOPMENT: THE CASE OF SUB-SAHARAN AFRICA* (2005); *THE BRAIN DRAIN OF HEALTH PROFESSIONALS FROM SUB-SAHARAN AFRICA TO CANADA* (Jonathan Crush ed., 2006); J. M. SIBRY TAPSOBA, *BRAIN DRAIN AND CAPACITY BUILDING IN AFRICA* (2000).

courts into a separate, self-managed branch of government with exclusive functions and jurisdiction,”²⁶³ judicial independence is rarely realized in practice in these countries. As argued by Prempeh,²⁶⁴ many African governments, pressured by “international donors and creditor nations to demonstrate their democratic credentials,”²⁶⁵ provide their countries with a “formal constitutional guarantee of judicial independence,”²⁶⁶ but in reality, “judicial independence remains vulnerable to political control.”²⁶⁷ Throughout the continent, many judiciaries are unable to maintain the independence guaranteed to them by the constitution because other critical aspects or elements of judicial independence are missing—such judiciaries usually lack the authority to control their own budgets, because the power of the purse is vested either with the executive or legislative branches. They also lack “security of tenure” and “institutional independence.”²⁶⁸ For example, as determined by Fombad in a study of the Cameroon judiciary, the president of the Republic not only has the power to “guarantee” the independence of the judiciary,²⁶⁹ but also directly controls all financial matters dealing with the judiciary.²⁷⁰ Prempeh states that the dependence of African judiciaries on the executive and legislative branches is worsened by “the fact that the judiciary has historically been severely under-resourced, leaving it with inadequate and outmoded technology, dilapidated and overcrowded courthouses and offices, and underpaid judges and staff.”²⁷¹

So that there can be peaceful coexistence of each country’s diverse ethnic and religious groups, which is critical for engagement in those productive activities that create wealth and enhance human development, judicial independence must not only be guaranteed in the constitution, but the necessary institutional facilities must be provided so that the judiciary can realize that independence in practice. For example, as has been

263. Prempeh, *supra* note 139, at 1305.

264. *Id.*

265. *Id.* at 1304–05.

266. *Id.* at 1305.

267. *Id.*

268. See *Van Rooyen v. The State* (2002)[5]SA 246[CC], para. 29.

269. CONSTITUTION OF THE REPUBLIC OF CAMEROON, arts. 37(2), (3).

270. Fombad, *supra* note 100, at 247–48.

271. Prempeh, *supra* note 139, at 1305.

made clear by South Africa's Constitutional Court,²⁷² the judiciary must be provided the minimum requirements for judicial independence, which are (1) "security of tenure"; (2) "a basic degree of financial security"; and (3) "institutional independence."²⁷³

Corruption and rent seeking are major constraints to the creation of wealth in Africa.²⁷⁴ One of the most effective ways to deal with corruption is to make certain that public policies are undertaken in an open and transparent manner. In addition to the fact that openness and transparency can significantly improve the efficiency of the public sector, they can also force civil servants and politicians to be more accountable to both the people and the constitution, thus, minimizing corruption, rent seeking, and other behaviors that stunt entrepreneurship and the creation of wealth. During the last fifty years, corruption has been pervasive throughout most African economies, making it very difficult for these countries to develop and sustain the robust private sector needed to anchor each country's wealth creation effort. Perhaps, more important is the fact that corruption deprives those at the bottom of the economic ladder of the opportunity to participate gainfully in the economy, as well as gain access to welfare-enhancing public goods and services.²⁷⁵

The protection of human rights is a critical factor in development. For example, throughout Africa, women and girls are regularly abused and deprived of their fundamental rights.²⁷⁶

272. See *De Lange v. Smuts* (1998)[3]SA 785[CC], para. 59; *Van Rooyen v. The State* (2002)[5]SA 246[CC], para. 18.

273. *Van Rooyen v. The State*, para. 29.

274. See generally MBAKU, CORRUPTION IN AFRICA; MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 1.

275. MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 109–10.

276. See generally Lars Almroth & Susan Elmusharaf, *Genital Mutilation of Girls*, 3 WOMEN'S HEALTH 475 (2007); Monica Antonazzo, *Problems with Criminalizing Female Genital Cutting*, 15 PEACE REV. 471 (2003); Fareda Banda, *Women, Law and Human Rights in Southern Africa*, 32 J.S. AFR. STUD. 13 (2006); GRACE, TENACITY AND ELOQUENCE: THE STRUGGLE FOR WOMEN'S RIGHTS IN AFRICA (Patrick Burnett, Shereen Karamali & Firoze Manji eds., 2007); Laurie Charles, *Young Women Struggling for an Education: Systemic Work with a Village Community in West Africa*, 18 J. FEMINIST FAM. THERAPY 63 (2006); Sheila Dauer & Mayra Gomez, *Violence Against Women and Economic, Social and Cultural Rights in Africa*, 7 HUM. RTS. REV. 49 (2006); Uche U. Ewelukwa, *Post-Colonialism, Gender, Customary Injustice: Widows in African Societies*, 24 HUM. RTS. Q. 424 (2002); Ifeanyi Ezeonu

In addition to the fact that such abuse significantly degrades the quality of life for these citizens, it also deprives them of the opportunity for self-actualization—for example, the opportunity to develop the human capital that they need to participate fully and effectively in political and economic markets, including creating their own wealth; to access the credit that they need to engage in productive activities; to own real property, which is an important way to store one's wealth for the future; and to travel, so that they can migrate to where their labor skills are needed the most, and earn competitive compensation packages for their labor services, or start and manage their own businesses. Throughout the continent, human rights abuses remain at the heart of why so many African women and girls are among the continent's poorest and most materially deprived inhabitants. Hence, the protection of the fundamental rights of all citizens is critical for poverty alleviation and human development.²⁷⁷

& Emmanuel Koku, *Crimes of Globalization: The Feminization of HIV Pandemic in Sub-Saharan Africa*, 2 GLOBAL S. 112 (2008); Rose Gawayia & Romesmary Mukasa, *The African Women's Protocol: A New Dimension for Women's Rights in Africa*, 13 GEN. & DEV. 42 (2005); Jeffrey Gettleman, *Rape Epidemic Raises Trauma of Congo War*, N.Y. TIMES, October 7, 2007, at A1; Anne Hellum, *Land Reform and Human Rights in Contemporary Zimbabwe: Balancing Individual and Social Justice Through an Integrated Human Rights Framework*, 32 WORLD DEV. 1785 (2004); H. Leibling-Kalifani, A. Marshall, R. Ojiambo-Ochieng & N.M. Kakembo, *Experiences of Women War-Torture Survivors in Uganda: Implications for Health and Human Rights*, 8 J. INT'L WOMEN'S STUD. 1 (2007); SALLY E. MERRY, HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE (2006); Ami R. Moore, *Types of Violence Against Women and Factors Influencing Intimate Partner Violence in Togo (West Africa)*, 23 J. FAM. VIOLENCE 777 (2008); Philomena Njeri Mwaura, *Stigmatization and Discrimination of HIV/AIDS Women in Kenya: A Violation of Human Rights and Its Theological Implications*, 37 EXCHANGE 35 (2008); Kenneth Kaoma Mwenda, *Labia Elongation under African Customary Law: A Violation of Women's Rights?*, 10 INT'L J. HUM. RTS. 341 (2006); Nawal M. Nour, *Health Consequences of Child Marriage in Africa*, 12 EMERGING INFECTIOUS DISEASES 1644 (2006); Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims*, 18 HARV. HUM. RTS. J. 85 (2005).

277. See generally HUMAN RIGHTS, THE RULE OF LAW, AND DEVELOPMENT IN AFRICA (Paul Tiyambe Zeleza & Philip J. McConaughay eds., 2004).

V. THE ARAB AWAKENING: THE CONTINUING EFFORT TO
ENHANCE DEVELOPMENT IN AFRICA

After a Tunisian street vendor named Tarek al-Tayeb Mohamed Bouazizi set himself on fire as a protest against humiliation by government regulators, his subsequent death provided the impetus to what later became a new political, economic, and social awakening among ordinary Tunisians.²⁷⁸ This awakening, which was later referred to as the “Arab Spring,” manifested itself in a series of grassroots anti-government protests, which effectively overthrew the government of Tunisia’s authoritarian ruler, President Zine el-Abidine Ben Ali, on January 14, 2011.²⁷⁹

The pro-democracy demonstrations that began in Tunisia after Bouazizi’s self-immolation, spread to other countries in North Africa and the Middle East. In Egypt, citizens took to the streets to demand the ouster of their president, Hosni Mubarak.²⁸⁰ Throughout this region, citizens awoke to a new way of thinking about human rights, governance, and development. They arose to demand that their governments respect their “basic social, political, and economic rights.”²⁸¹ Before the masses of these countries took to the streets to demand that their rights be respected, their governments had routinely “violated international law by prohibiting the rights to assemble and to freedom of expression” guaranteed by international con-

278. See, e.g., Rania Abouzeid, *Bouazizi: The Man Who Set Himself and Tunisia on Fire*, TIME (Jan. 21, 2011), <http://www.time.com/time/magazine/article/0,9171,2044723,00.html>; Peter Beaumont, *Mohammed Bouazizi: The Dutiful Son Whose Death Changed Tunisia’s Fate*, GUARDIAN (Jan. 20, 2011), <http://www.guardian.co.uk/world/2011/jan/20/tunisian-fruit-seller-mohammed-bouazizi>.

279. See, e.g., BBC News, *Tunisia: President Zine al-Abidine Ben Ali Force Out* (Jan. 14, 2011), <http://www.bbc.co.uk/news/world-africa-12195025>; Angélique Chrisafis & Ian Black, *Zine al-Abidine Ben Ali Forced to Flee Tunisia as Protesters Claim Victory*, GUARDIAN (Jan. 14, 2011), <http://www.guardian.co.uk/world/2011/jan/14/tunisian-president-flees-country-protests/print>.

280. See generally Shubra Ohri, *Column: International Legal Updates—Middle East and North Africa*, 18 HUM. RTS. BRIEF 45 (2011).

281. *Id.*

ventions²⁸² that had been ratified by these countries. Bouazizi's frustration was shared by not just the masses of Tunisia, but by those in Egypt and other countries in the region. They sought the opportunity to govern themselves by determining, or at the very least participating in the determination of, their own laws, the choosing of their own leaders, and participating fully and effectively in the creation of wealth.²⁸³

Generally, the Arab awakening resulted in the demise of brutal governmental regimes in Egypt, Libya, and Tunisia. Elections, considered relatively free by both domestic and international observers,²⁸⁴ have taken place in all three countries, and in Egypt and Tunisia, the government has been captured by Islamist political parties.²⁸⁵ Already, there are fears, especially by some groups in these countries, notably women and religious minorities, that even though these new regimes came to power through democratic processes, they are likely to reject

282. For example, the International Covenant on Civil and Political Rights (1966) and the International Covenant on Social, Political and Economic Rights (1966).

283. Note that unlike the situation in Egypt and Tunisia, where grassroots demonstrations resulted in the ouster of the governments of these countries, the overthrow of Libya's Muammar Qaddafi was only made possible with significant military assistance from the international community. Nevertheless, there was still significant participation by Libyans who had suffered tremendously under Qaddafi's brutal dictatorship. *See generally* Catherine Powell, *Note and Comment: Libya: A Multilateral Constitutional Moment?*, 106 AM. J. INT'L L. 298 (2012).

284. *See* David D. Kirkpatrick, *Egyptians Vote in First Free Election for President*, N.Y. TIMES (May 23, 2012), http://www.nytimes.com/2012/05/24/world/middleeast/egypt-presidential-election.html?_r=0; BBC NEWS, *Tunisia Counts Vote in Historic Free Election* (Oct. 24, 2011), <http://www.bbc.co.uk/news/world-africa-15425407>; Glen Johnson, *Libyans Vote in First Free Elections in Decades*, L.A. TIMES (July 7, 2012), <http://articles.latimes.com/2012/jul/07/world/la-fg-libya-elections-20120708>.

285. *See* Keven Schofield, *Islamist Party Muslim Brotherhood Wins Egyptian Elections*, SUN (U.K.) (June 25, 2012), <http://www.thesun.co.uk/sol/homepage/news/4392234/Islamist-party-Muslim-Brotherhood-wins-Egyptian-elections.html>; David D. Kirkpatrick, *Tunisia: Islamist Party Wins Vote*, N.Y. TIMES (Oct. 27, 2013), http://www.nytimes.com/2011/10/28/world/middleeast/tunisia-islamist-party-wins-vote.html?_r=0. The Islamists, however, did not win in Libya. David D. Kirkpatrick, *Election Results in Libya Break an Islamist Wave*, N.Y. TIMES (July 8, 2012), <http://www.nytimes.com/2012/07/09/world/africa/libya-election-latest-results.html?pagewanted=all>.

democratic governance as soon as they have consolidated their power.²⁸⁶

But were the events that characterized the Arab awakening transformative enough to provide citizens of Egypt, Libya, and Tunisia with institutional arrangements capable of enhancing peaceful coexistence, promoting entrepreneurship, especially among historically marginalized groups, and adequately constraining the state so that its custodians would not continue to behave with impunity as they had done prior to the “revolutions”?

The answer to the above question is that what happened in all three countries can better be described as “regime changes,” and not the type of transformative processes that could have produced truly democratic governmental institutions. For example, in Egypt, the Mubarak-imposed anachronistic, oppressive, exploitative, and elite-driven governance architecture remains firmly in place. Egypt’s revolution did not involve the type of bottom-up, inclusive, participatory, and people-driven institutional reconstruction that would have produced institutional arrangements capable of guaranteeing Egyptian citizens’ fundamental rights, greatly enhancing their ability to coexist peacefully and engage freely in productive activities to create the wealth that they need to deal with poverty and deprivation. First, the country’s first freely-elected parliament in sixty years was sacked by the Supreme Constitutional Court (“SCC”), an anachronism from the Mubarak era.²⁸⁷ By dissolving a democratically elected parliament, the SCC effectively quashed the most important achievement of the Egyptian “revolution.” Sec-

286. For example, as reported by Marc Fisher, several YouTube preachers in Tunisia are currently “offering a vision of Islam that rejects democracy and elections.” They preach that “[d]emocracy’s freedom is absolute,” and that “we don’t accept that. In our religion, freedom is limited to the freedom God gives you.” Marc Fisher, *In Tunisia after Arab Spring, Islamist’s New Freedoms Create New Muslim Divide*, WASH. POST (Apr. 28, 2012), http://www.washingtonpost.com/world/in-tunisia-after-arab-spring-islamists-new-freedoms-create-new-muslim-divide/2012/04/28/gIQAN9yJoT_story.html.

287. All the judges in the Supreme Constitutional Court (“SCC”) were appointed by Hosni Mubarak. The SCC is considered a highly politicized body. See, e.g., Lama Abu Odeh, *The Supreme Constitutional Court of Egypt: The Limits of Liberal Political Science and CLS Analysis of Law Elsewhere*, 59 AM. J. COMP. L. 985 (2011); James Feuille, Note, *Reforming Egypt’s Constitution: Hope for Egyptian Democracy?*, 47 TEX. INT’L L.J. 237, 244 (2011).

ond, the Supreme Council of the Armed Forces ("SCAF"), a Mubarak-era institution, assumed the powers of the legislature,²⁸⁸ as well as some of the powers traditionally vested in the executive.²⁸⁹ In addition to the fact that the SCAF appropriated the power to legislate, it also made it clear to the new president, Mohamed Morsi of the Islamic Brotherhood movement, that in selecting a cabinet, he had to leave the post of defense in the hands of the military.²⁹⁰ When President Morsi announced his thirty-five member cabinet on August 2, 2012, Field Marshal Hussein Tantawi, who was also head of the SCAF, retained his position as the defense minister.²⁹¹ However, on August 12, 2012, President Morsi ordered the retirement of the country's two top military officers, including General Hussein Tantawi. The other military officer, who was head of the SCAF and the Defense Minister, was summarily sacked. Morsi then proceeded to "unilaterally [annul] constitutional declarations issued by SCAF that had taken the power to legislate out of Morsi's hands."²⁹² Although Morsi, through his actions, successfully asserted civilian authority over the military, Egyptians have yet to engage in democratic institutional reforms to provide themselves with institutional arrangements that guarantee the rule of law. While Morsi's actions have significantly increased his power base and that of his Freedom and Justice Party, they have neither advanced nor deepened

288. Sarah El Deeb, *Egypt's President Asserts Authority, Defends Army*, GUARDIAN (Aug. 4, 2012), <http://www.guardian.co.uk/world/feedarticle/10373511>.

289. *Id.* El Deeb explains that the Supreme Council of the Armed Forces ("SCAF") "stripped [the new president] of significant powers and declared themselves as the country's legislative authority after dissolving a parliament dominated by Morsi's Islamic Muslim Brotherhood movement." The SCAF has also appropriated the power to write the country's permanent constitution, a job that should be performed either by the Egyptian people or their duly elected representatives.

290. See Abdel-Rahman Hussein, *Egypt Swears in First Post-Revolution Cabinet with Plenty of Old Guard*, GUARDIAN (Aug. 2, 2012), <http://www.guardian.co.uk/world/2012/aug/02/egypt-middleeast>.

291. Edward Yeranian, *Egypt Names Cabinet, Keeps Veteran Defense Minister*, VOICE OF AMERICA (Aug. 2, 2012), <http://www.voanews.com/articleprintview/1453820.html>.

292. Dan Murphy, *Egypt's President Morsi Fires Senior General Tantawi, Asserting his Power*, CHRISTIAN SCI. MONITOR (Aug. 12, 2012), <http://www.csmonitor.com/World/Backchannels/2012/0812/Egypt-s-President-Morsi-fires-senior-general-Tantawi-asserting-his-power>.

sustainable democracy in the country. Moreover, they do not seem to have moved the country closer to acquiring legal and judicial systems undergirded by an adherence to the rule of law.

On November 22, 2012, President Morsi issued a decree that granted him immunity from judicial overview or oversight.²⁹³ Morsi, who had come into power with a reformist mission and had been expected by Egyptians to guide the country's transition to democratic governance, was now engaging in practices common in the Mubarak dictatorship—he was acting arbitrarily and capriciously, and ultra vires.²⁹⁴ Morsi later agreed to limit the scope of his November 22, 2012 decree;²⁹⁵ however, his extra-constitutional actions did not bode well for the institutionalization of the rule of law in Egypt.

In January 2013, extremely violent demonstrations enveloped several Egyptian cities, notably, Port Said, Suez, and Ismailiya, after a court sentenced twenty-one football fans to death for the February 2012 riot that killed over seventy people.²⁹⁶ Many of the Egyptians taking part in the January 2013 demonstrations that followed the court decision argued that

293. David D. Kirkpatrick & Mayy El Sheik, *Citing Deadlock, Egypt's Leader Seizes New Power and Plans Mubarak Retrial*, N.Y. TIMES (Nov. 22, 2012), http://www.nytimes.com/2012/11/23/world/middleeast/egypts-president-morsi-gives-himself-new-powers.html?_r=0.

294. *Id.* Condemnation of Morsi's extra-constitutional act was swift and almost universal. Some opposition leaders argued that Morsi had established an "absolute presidential tyranny" and that "Egypt [was] facing a horrifying coup against legitimacy and the rule of law and a complete assassination of the democratic transition." By engaging in such extra-constitutional acts, Morsi was announcing to his fellow citizens that Egyptian law does not bind government officials. In other words, his actions supported the view that Egyptian institutional arrangements do not guarantee the supremacy of law. Morsi already had executive and legislative powers, and through the decree that he issued on November 22, 2012, he effectively neutered the judiciary.

295. David D. Kirkpatrick & Mayy El Sheik, *Seeming Retreat by Egypt Leader on New Powers*, N.Y. TIMES (Nov. 26, 2012), <http://www.nytimes.com/2012/11/27/world/middleeast/egypts-president-said-to-limit-scope-of-judicial-decree.html?pagewanted=all&>.

296. Patrick Kingsley, *Mohamed Morsi Declares Emergency in Three Egyptian Cities*, GUARDIAN (Jan. 27, 2013), <http://www.guardian.co.uk/world/2013/jan/27/mohamed-morsi-emergency-provinces>. See also, *21 Fans Sentenced to Death for Football Riot*, EUROSUPPORT.COM (Jan. 26, 2013), http://au.eurosupport.com/football/international-football/2010/21-fans-sentenced-to-death-for-football-riot_sto3593356/story.shtml.

the courts had “scapegoated” the defendants for the events of February 2012. Morsi, who earlier had acted extra-constitutionally in an effort to amass more power for himself, and in doing so, had ignored the nation’s courts, was now appealing to the demonstrators to respect the decisions of the court. He subsequently declared a thirty-day curfew and invited the opposition to a national dialogue, but the offer was rejected as essentially cosmetic.²⁹⁷ Opposition leaders indicated that they would continue to encourage further protests unless President Morsi agreed to form a more inclusive government and discard the recently adopted constitution.²⁹⁸ It now appears that what was once a dynamic, progressive, bottom-up, and people-driven effort to transform Egyptian institutions and entrench a governance system undergirded by the rule of law, has turned or degenerated into a top-down, elite-driven attempt to impose a Mubarak-type authoritarian system in the country. In fact, since November 2012, when Morsi issued his decree, reform in Egypt has essentially degenerated into a fight between the SCAF, the SCC, and President Morsi for political supremacy. No effort is being made to engage the country’s diverse stakeholder groups in the type of robust discourse that can produce laws and institutions capable of providing an effective foundation for democratic governance.

On January 30, 2013, amid threats from a military oblivious to its constitutional role, a unified Egyptian opposition invited President Morsi to form a government of national unity as a

297. See Kingsley, *supra* note 296; Matthew Weaver, *Egypt Crisis: Opposition Rejects Morsi’s Offer of Talks*, *GUARDIAN* (Jan. 28, 2013), <http://www.guardian.co.uk/world/middle-east-live/2013/jan/28/egypt-morsi-state-of-emergency-live>.

298. Weaver, *supra* note 297. Here, even a seemingly united opposition appears to be failing the Egyptian people, especially the youth who had risked their lives to secure the overthrow of the Mubarak regime. Instead of demanding that Morsi form a unity government—a proposal that, if accepted, would grant opposition elites seats in the government—opposition leaders should be pushing vigorously for the country to engage in a fully inclusive and robust national dialogue on constitution-making and the development of democratic institutions. Such a process-driven approach to institutional reforms should produce a constitution that reflects the values of all of the country’s relevant stakeholder groups, not just those of the Islamists that dominated and controlled the drafting of the Morsi constitution, which was adopted in December 2012. See *Egypt Adopts New Constitution as Opposition Cries Foul*, *YAHOO! NEWS N.Z.*, <http://nz.news.yahoo.com/a/-/world/15710581/egypt-adopts-new-constitution-as-opposition-cries-foul/> (last updated Dec. 26, 2012).

way to halt further violent demonstrations.²⁹⁹ However, even if such a unity government is formed (as of this writing, Morsi had rejected the opposition's offer³⁰⁰) and the destructive mobilization is temporarily halted, the larger and more important problem of anachronistic and dysfunctional institutions will remain unresolved.

Many Egyptians, Tunisians, and Libyans are feeling a significant level of frustration about their revolutions.³⁰¹ That level

299. Kareem Fahim & Nicholas Kulish, *Opposition in Egypt Urges Unity Government*, N.Y. TIMES (Jan. 30, 2013), http://www.nytimes.com/2013/01/31/world/middleeast/egypt-protests.html?_r=0.

300. Melissa Eddy & Nicholas Kulish, *Morsi Rejects Calls for New Unity Government in Egypt*, N.Y. TIMES (Jan. 30, 2013), <http://www.nytimes.com/2013/01/31/world/middleeast/egyptian-president-shortens-europe-visit-reports-say.html>. The process through which the Morsi constitution was compacted did not allay the fears of minority groups within Egypt that the Islamist-dominated government would not use their new-found power to relegate them (i.e., the minorities) to the political and economic periphery. First, the constituent assembly that drafted the Morsi constitution was dominated by Islamists. Second, virtually no allowance was made for nationwide dialogue and consultation. Finally, Morsi, an Islamist himself and leader of the country, exercising both executive and legislative powers, had issued a decree that effectively granted him supremacy over all Egyptian institutions. See Erica Ritz, *Egyptian Opposition Leader: 'Pharaoh' Morsi Must Rescind Recent Edicts or 'Cycle of Violence' Likely to Begin*, BLAZE (Nov. 24, 2012, 10:38 PM), <http://www.theblaze.com/stories/2012/11/24/egyptian-opposition-leader-pharaoh-morsi-must-rescind-recent-edicts-or-cycle-of-violence-likely-to-begin>.

301. For example, in Egypt, many of the youth leaders of the revolution are frustrated about continued military interference in governance; women and minority groups (e.g., Coptic Christians) are frustrated about the direction in which the Islamist-dominated government is taking the country. Although the new president has "vowed to open up his government to women, minorities and rival political parties, . . . analysts note that the new Cabinet contains only token representation for women and Christians." Yeranian, *supra* note 291. In Tunisia, the country's Islamists, who came to power through democratic elections, are likely to reject democracy and elections and bring about institutional changes that would return the country to authoritarian rule; this time, based on extremely conservative Islamic beliefs. Fisher, *supra* note 286. On February 6, 2013, Chokri Belaid, a secularist and a staunch critic of Prime Minister Hamadi Jebali's ruling Islamist government, was brutally assassinated. Mr. Belaid had advocated retention of Tunisia's secularist tradition and had, in recent years, emerged as the country's most important opposition leader. His cowardly murder could set the country's transition to democratic governance back many years. Considering the fact that Mr. Belaid was quite an accessible politician, who had fought to defend the

of frustration may be related to the fact that these revolutions failed to achieve their ultimate objective: to reconstruct anachronistic and dysfunctional state systems, and provide the people with governance structures capable of effectively constraining state custodians and guaranteeing the protection of the fundamental rights of citizens, including the prevention of violence orchestrated either by state or non-state actors against minorities and other vulnerable groups. The revolutions failed to totally transform and reconstitute the critical domains—the political, administrative, and judicial foundations of the state—and as a result, citizens of these countries continue to face the same anachronistic institutions that had oppressed, infantilized, and exploited them for years.³⁰² Given the opportunity, Egyptians would definitely have engaged in the type of constitution-making that would have subjected the military, including the SCAF, to civilian control and prevented it from engaging in the type of political manipulations that have allowed it to effectively hijack the country's revolution and frustrate the people's efforts to reform their institutions. Additionally, such robust and participatory constitutional discourse would have helped Egyptians provide themselves with laws and institutions that guarantee real separation of powers, and effectively prevent the type of extra-constitutional behaviors and usurpation of the functions of other branches of government that have been exhibited by President Morsi in his efforts to acquire more powers for himself.³⁰³

Like other pro-democracy groups elsewhere in the continent, such as those that emerged across Africa in the mid-1980s and early-1990s, Egypt's new democrats believed, albeit mistakenly, "that if they ousted the head of state its body would fall."³⁰⁴

rights of all Tunisians, including the Islamists, the decision to murder him instead of engaging him in dialogue was cowardly and brutish. See James Bone, *Tunisia Protests after Assassination of Opposition Politician Chokri Belaid*, TIMES (London) (Feb. 6, 2013), <http://www.thetimes.co.uk/tto/news/world/africa/article3679904.ece>.

302. After the Egyptian revolution, institutions that had effectively been used by the Mubarak regime to terrorize the people remain in place. In fact, the SCC, which dissolved the democratically-elected parliament, remains in place and so does the SCAF.

303. Kirkpatrick & El Sheik, *supra* note 293.

304. David D. Kirkpatrick, *Revolt Leaders Cite Failure to Uproot Old Order in Egypt*, N.Y. TIMES (July 14, 2012),

Although Egypt's Mubarak, who for many decades had ruled the country with extremely efficient cruelty, is no longer in power, the institutional structures that supported his brutal dictatorship remain virtually intact. Hence, as admirable and as monumental as the uprising was, it was not a real transformative revolution; one producing more democracy-friendly laws and institutions. Today, the political, administrative, and judicial structures that significantly enhanced the ability of the *ancien régime* to oppress and infantilize the Egyptian people are still intact and are being used by the "new" leadership to frustrate the ability of Egyptians to deepen and institutionalize democratic governance.

What the Arab awakening did was offer citizens of the various countries the opportunity to undertake the reconstruction and reconstituting of the anachronistic and dysfunctional state structures inherited from the *ancien régimes*, and provide laws and institutions capable of adequately constraining the state and enhancing the ability of citizens to take a more active part in poverty eradication through entrepreneurship and wealth creation. Unfortunately, the revolutions in these countries were still-born, and state reconstruction remains a work-in-progress. Of course, one can consider the new governments in Egypt, Libya, and Tunisia as interim or transitional governments whose job it is to provide the people with the wherewithal to undertake democratic and effective state reconstruction. One problem with this approach is that without effective legal constraints on their activities, these new governments are not likely to engage the people in the type of robust dialogue that could lead to participatory, inclusive, and people-driven institutional reforms. For example, in Egypt, Morsi's Islamic Brotherhood-dominated Freedom and Justice party has effectively hijacked the process of compacting the country's permanent constitution and has produced a constitution that virtually all members of the opposition—especially the Coptic minority, as well as several youth, including those who engineered the uprising that ousted Mubarak—believe would enhance the ability of the Islamists to turn Egypt into a theocracy.³⁰⁵ Of course, the Egyp-

http://www.nytimes.com/2012/06/15/world/middleeast/egyptian-revolts-leaders-count-their-mistakes.html?_r=1&sudsredirect=true.

305. David D. Kirkpatrick & Mayy El Sheikh, *Egypt Opposition Gears up after Constitution Passes*, N.Y. TIMES (Dec. 23, 2012),

tian military remains as dominant as ever in the country's political economy.³⁰⁶ Meanwhile, in Tunisia, Islamist preachers are pushing the Islamist-dominated government to adopt governance structures based on Islamic law.³⁰⁷

VI. CONCLUSION

Today, Africans face three important policy priorities: (1) effectively managing ethnic and religious diversity in order to secure the peaceful coexistence that is critical for investment and the building and sustaining of wealth-creating capacity; (2) fostering the development of private sectors that are capable of producing the wealth that these countries need to deal effectively with poverty and deprivation, and provide a foundation for eventual eradication of poverty; and (3) minimizing corruption, rent seeking, and other growth-inhibiting behaviors.

These priorities are all interrelated. For example, the failure of African governments to manage ethnic and religious diversity has often resulted in destructive and violent mobilization by groups that perceive themselves as being marginalized by a central government dominated and controlled by other groups.³⁰⁸ The result has been significantly high levels of political instability, which have created economic environments that are not suitable for, or conducive to, investment and/or engagement by entrepreneurs in productive activities. Peaceful coexistence creates opportunities for mutually-beneficial exchanges between groups, which may include cultural exchanges and trade. Such exchanges can lead to innovation and the creation of new knowledge that can aid production and the peaceful resolution of problems and conflicts.

State actors, such as civil servants and politicians, are responsible for a significant amount of the corruption and rent seeking that takes place in the African countries today.³⁰⁹

http://www.nytimes.com/2012/12/24/world/middleeast/as-egypt-constitution-passes-new-fights-lie-ahead.html?_r=0.

306. El Deeb, *supra* note 288.

307. Fisher, *supra* note 286.

308. Examples include Ibos in Nigeria, Ogonis in the Niger Delta of Nigeria, various indigenous groups in Liberia, and southerners in the Republic of Sudan.

309. See MBAKU, INSTITUTIONS AND DEVELOPMENT, *supra* note 1, at 137–40; MBAKU, CORRUPTION IN AFRICA, *supra* note 1, at 12–13; John Mukum Mbaku,

Thus, to minimize the engagement of state actors in growth-inhibiting behaviors, it is necessary that the state be adequately constrained by the constitution. To adequately restrain the state, the law must be supreme—no citizen, regardless of their political, economic, or traditional standing in society, can be above the law. Judicial independence must also be assured, so that the executive does not turn judiciary structures into instruments of control and plunder. In addition, the laws chosen must reflect the values and aspirations of citizens, that is, the laws need to be locally-focused, and must also be laws that citizens can obey in order to enhance compliance and minimize the costs of policing. Furthermore, government operations must be conducted in an open and transparent manner to minimize corruption, enhance participation, and increase the people's trust in the government. Finally, the rights of minorities must be protected—it is critical that the rights of minority ethnic and religious groups be protected, not just from state tyranny, but also from violence perpetuated against them by non-state actors.

The rule of law is a critical catalyst to Africa's effort to deal effectively with poverty. Each country must engage its citizens in democratic constitution-making to provide laws and institutions that guarantee the rule of law. One must caution that what is being advocated here is not simple regime change as has occurred in many countries throughout the continent. In order to secure institutional arrangements that guarantee the rule of law, countries must engage in the type of robust state reconstruction that provides all of the country's relevant stakeholders with the wherewithal to participate fully and effectively in institutional reforms. It is only through such a democratic process that a country can avail itself of legal and judicial frameworks that guarantee the rule of law, and hence, provide the environment for peaceful coexistence, wealth creation, and democratic governance.